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THE HYPERREGULATORY STATE: WOMEN, RACE, POVERTY AND SUPPORT

*Wendy A. Bach**

INTRODUCTION

Imagine yourself for a moment as a mother seeking help from the state. Your need might be for education, safety, housing, money, health care or childcare. Depending on your where you live, your race, gender, and class position and the composition of your family, the support you seek is likely to arrive, if arriving at all, in radically different packages. If you are more likely white than you would be in a world without structure racism, if you hold an elevated class position and if you live in an economically privileged community, help is likely to come in to you in a particular form. For you, help may come in the form of high quality public schools, child care or home mortgage deductions, safe streets or employer based, but government subsidized health care. The support you receive from that subject position is certainly not enough, but it is not likely to be structured to penalize you for seeking support. The only real risk you run by seeking support is the possibility that you might not get it.

In contrast, if you are a poor, and more likely than in a world without structural racism, African American, and if you are living as a parent in the inner city, any support you receive is likely to be structured quite differently. The meager support that may be available comes in the form of welfare, Food Stamps, public housing, underfunded, overpoliced schools and publically funded, overcrowded health care facilities. Moreover, and central to the arguments put

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forward here, this support is likely to come at an enormous punitive risk both within the initial social welfare system and beyond. The regulatory mechanisms of those systems of support are likely to function in at least two ways. They will, if you are lucky and resourceful enough to navigate the many barriers to receipt, dole out some much-needed but meager support. But the price of that support is exposure to a set of mechanisms, here termed regulatory intersectionality, by which regulatory systems intersect to share information and heighten the adverse consequences of what those systems quite easily deem to be unlawful or noncompliant conduct. Quite simply if you are poor, African American and living in the inner city, by seeking support you risk far more than simply being deprived of support. By seeking support you elevate your risk of exposure to ever more punitive consequences. You risk exposure, in the examples in this article, to a child welfare system that is far more likely to take and keep your children and in which your children are likely to fare horribly. You also risk exposure to a criminal "justice" system that is more likely to impose harsh criminal consequences for your allegedly deviant conduct. The state you encounter not only fails to respond to your need in any meaningful way. Instead the state is hyperregulatory, meaning here that its mechanisms are targeted, by race, class, gender and place, to exert punitive social control over poor, African American women, their families and their communities.

Feminist political and legal theorists are currently engaged in a vital project. This work, led by scholars like Martha Fineman and Maxine Eichner, teaches that both dominant American political theory and, more importantly, the structures of current state institutions fail to enable families to meet dependency needs and are, in the name of an emaciated view of autonomy, obscenely content to leave gross inequality in place. This work provides a potent critique, a clearly better vision of the state we need and a theory that holds great promise in getting us there. As we consider their vision, however, we must remember, as the work of Kimberle Crenshaw, Khiara Bridges, Kaaryn Gustafson and Dorothy Roberts, among many others, counsels, that if we are to build institutions that are responsive to some of the most vulnerable among us, we must seek to understand the particular institutional realities that constitute the relationship between poor and disproportionately African American women and the current state, and we must ask how these particular realities impact the path to a supportive or responsive state.[1]

[1] Feminist theory has long been criticized for centering the experiences of white,

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This article builds on the work of critical race theory, intersectionality theory, and critical sociology to make three interrelated arguments. First, the article argues that social welfare institutions that serve and target poor communities are characterized by phenomena here termed "regulatory intersectionality," defined as the means by which regulatory systems intersect to share information and heighten the adverse consequences of unlawful or noncompliant conduct originally observed in a social welfare setting. Second, in addition to introducing and exploring the specific functioning of regulatory intersectionality, the article borrows from the work of Loïc Wacquant to introduce a second broader set of terms: hyperregulation and the hyperregulatory state. While regulatory intersectionality describes the functioning of a particular set of administrative structures, the hyperregulatory state is broader. It encompasses a wide range of mechanisms that are targeted by race, class, gender, and place and exert social control over poor, African American women, their families, and their communities. Third and finally, the article builds on and responds to theories of vulnerability and the supportive or responsive state. In this vein it argues that the mechanisms of regulatory intersectionality render poor African American women, their families, and their communities radically more rather than less vulnerable. Because of this, in order to realize a truly supportive state

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citizen, middle class women and eliding the experiences of women who differ along the lines of race, citizenship, class, or other identity axes. Historically, by centering the experiences of white women of privilege, streams within feminist discourse have given rise to social policy that at best fails to meet the needs of poor women and women of color and at worst contributes to their continued subordination. The critique waged by Kimberle Crenshaw in 1991 that the domestic violence and anti-rape movements, by centering the experiences of white citizen women, at best erased and at worst undermined the safety and needs of women of color is among the most trenchant of such critiques. *See* Kimberle Crenshaw, *Mapping The Margins: Intersectionality, Identity Politics, and Violence Against Women of Color,* 43 STAN. L. REV. 1241 (1991). For foundational pieces on this topic *see, e.g.*, bell hooks, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM (1981); ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE: BLACK WOMEN'S STUDIES (Gloria T. Hull et al. eds., 1982); THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR (Cherríe Moraga & Gloria Anzaldúa eds., 2d ed. 1983). For relevant readings specific to some of the social welfare policy that is discussed in Section III of this article, *see e.g.* Jill Quadagno, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994). This article does not argue that either Fineman or Eichner ignore the institutional structures that target poor, disproportionately African American communities. This history does, however, counsel careful attention to these particular experiences and the particular responses that might lead to truly supportive state.

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we must ask difficult questions about how we might meet the extraordinary needs of those living in poverty (as well as those who are not living poverty) in a way that supports rather than undermines the abilities of families and communities to thrive.

The article proceeds as follows. Section I provides an overview of the political theory referenced above with a particular emphasis on its description of the functioning of the social welfare state. Section II then contextualizes this political theory within current discussions of social welfare history, sociology and critical race and intersectionality theory and introduces the framework of hyperregulation and the hyperregulatory state. Section III offers a description of the regulatory intersectionality as it plays out in public health and welfare settings. Drawing together the formal and informal structures of legal regulatory institutions and research documenting the disproportionate impact of these policies on poor women and poor communities of color, it highlights first the exposure of poor pregnant women to child welfare intervention and criminal prosecution as a result of drug testing in public hospitals; and second the referral of individuals to child protective agencies when welfare applicants test positive for drugs or refuse drug tests. In each of these cases, the poor women seeking support, who are disproportionately African American, find themselves subject not only to extraordinary surveillance but to a far reaching interconnected set of civil and criminal regulatory systems designed to impose escalating punitive consequences for their behavior. Finally Section IV concludes by offering a very preliminary discussion of the theoretical and practice implications of regulatory intersectionality and hyperregulation for building a supportive state.

I. The Failures of Liberal Theory and the Idea of the Supportive State

The recent work of Martha Fineman and Maxine Eichner[2]

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[2] When referencing the work of Fineman I am referring primarily to Fineman's work on Vulnerability and Dependency: Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 257 (2010) [hereinafter Fineman, *Vulnerable Subject*]; Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition* 20 YALE J.L. & FEMINISM 1 (2008) [hereinafter Fineman, *Anchoring Equality*]; and MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004) [hereinafter FINEMAN, THE AUTONOMY MYTH]. When referencing Eichner, I am referring primarily to MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT AND AMERICA'S POLITICAL IDEALS (2010). In these texts, Fineman and Eichner differ both as a matter of the methodology of how one might reach the vision of a supportive (in

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challenges us to reconceptualize the very subject of law and the role of the state.[3] As to the subject, Fineman and Eichner call the fundamental bluff of liberalism. They remind us that, as much as liberal political theory is built around the assumption that we are all autonomous and able, if simply left alone, to realize our full potential, in lived experience this is very far from true. They remind us that, while we are sometimes autonomous, we are frequently not. We are instead dependent and vulnerable. In addition, and crucially, some subjects are tremendously privileged while others "are caught in systems of disadvantage that are almost impossible to transcend."[4] As to the current operations of state in the domestic context, Fineman and Eichner offer a searing indictment. Each posits that the result of liberal rhetoric is a fundamentally unresponsive state. Vulnerable and dependent subjects are left alone to succeed or fail and the profound impacts of privilege and prejudice remain undisturbed. When people fail to live up to idealized notions of autonomy, they are blamed,[5] and either deprived of support or, as Eichner vividly describes in her discussion of U.S. child welfare policy, severely punished.[6]

The positive vision of the state that Eichner and Fineman offer is markedly different and, this article maintains, far better than the current state of affairs. While Fineman and Eichner differ on crucial issues of policy, the focus of their critique and the results they envision,[7] they both call for a state that responds to vulnerability

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Eichner's term) or responsive (in Fineman's) state, and these differences matter a great deal. They also differ significantly in what the end goal looks like, particularly on issues of how care work should be compensated. Throughout this section I will highlight, in footnotes, some of these differences. However, for the purposes of this portion of the article, I highlight the ways in which their work complements and builds upon each other's.

[3] Fineman and Eichner's work focuses on U.S. social policy in the domestic context, as do references to the "state" in this paper.

[4] Fineman, *Vulnerable Subject*, *supra* note 2, at 257. Eichner's critique of liberal theory begins not in current political discourse and its manifestations in social policy but in a fundamental critique of Rawlsian political theory as exemplified by his work in RAWLS, A THEORY OF JUSTICE. *See, e.g.* EICHNER, *supra* note 2, at 17-26 (critiquing the failure of Rawls to incorporate the role of the family in meeting dependency needs). In this article, however, I focus not on Eichner's critique of Rawls per se but on her analysis of how the idea of autonomy profoundly limits the ability of American political discourse to justify government institutions that meet dependency needs

[5] *Id.* at 257.

[6] EICHNER, *supra* note 2, at 119-123.

[7] For discussion, by Eichner, of the differences between her vision of the mechanism of the supportive state and Fineman's, see *id.* at 75-77. Eichner identifies

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through the creation of policies and institutions that address dependency. In Eichner's terms, rather than structuring policy in a way that either leaves families alone to meet needs or punishes them for failing to meeting needs, the supportive state would,

> [a]t a minimum . . . arrange institutions in such a way that family members can, through exercising diligent but not Herculean efforts, meet the basic physical, mental and emotional needs of children and other dependents and promote human development while avoiding impoverishment or immiseration.[8]

Moreover, Fineman in particular believes that the focus on vulnerability on the one hand and responsiveness on the other provides a powerful mechanism to address the profound inequalities that exist in U.S. society. Vulnerability theory, in Fineman's analysis forms the basis of a claim that state institutions must provide not just formal equal access but the material conditions necessary to achieve substantive equality.[9] Fineman and Eichner provide an essential critique and a compelling vision.

Building on that work, this article shifts the focus of inquiry to the punitive mechanisms of the state. It seeks to describe the specific ways that the mechanisms of the state actually operate for those who are, by virtue of the intersecting implications of class, race, gender and geography, among the most vulnerable. The article argues, in Section III, that in institutions like public hospitals and welfare offices, poor people, and disproportionately poor people of color, face a hyperregulatory state. Mechanisms of the state that purport to be in place to provide what remains of a shredded social safety net go far beyond failing to provide adequate support or even exacting a punitive price for the support within the social welfare system. Instead, because of their position and because of their need, poor families face an

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crucial differences between her vision and Fineman's particularly on the issue of whether parents should be compensated for care work. In addition, although their work is extraordinarily complementary, they do differ in significant ways in terms of emphasis. In particular Fineman frames her Vulnerability project around the profound failure of Equal Protection doctrine to support the conditions for substantive, as opposed to formal, equality. Eichner's work in THE SUPPORTIVE STATE focuses primarily on how state policies and social mechanisms can be restructured to support the work of families in meeting dependency needs.

[8] *Id.* at 78-79.

[9] *See infra* notes 27-42 and accompanying text.

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extraordinarily punitive state, one whose systems intersect, in a mechanism referred to here as regulatory intersectionality, to exact escalating punitive consequences on those who seek its support. Before describing those mechanisms, however, this Section lays out in more detail Fineman and Eichner's theory of the liberal subject, the current, largely unresponsive state, and the responsive state they collectively envision.

A. The Autonomous Subject and the Vulnerable Subject

The theory of the supportive state begins, fundamentally, with a critique the American ideal of the person to be governed. Liberal political theory, as manifested in dominant U.S. political discourse, is built, "on its conceptualization of individuals as autonomous and able."[10] We are, in this formulation, people who can pull ourselves up by our proverbial bootstraps. The purpose of government then, is to make sure that nothing gets in our way. We need liberty to protect against incursions on the exercise of our autonomy, and we need formal equality, some sense not that we will all end up equal but that we perhaps start the race at the same point, so that we can all reach our ultimate potential. In popular discourse, this proverbial race is primarily an economic one. We are all, in theory, free participants in the market, and nothing is supposed to get in the way of realizing our economic potential.

The problem with these ideas is, in short, that they "… [seem] to mistake this moral ideal for an account of the human condition."[11] It does so in two fundamental ways. First, they entirely fail to account for the fact that we are often dependent. We are young, old, sick and unable to meet our needs. We are dependent, and we are vulnerable. Second, the theory fails to acknowledge that, "[f]ar from having equal opportunity, many individuals are caught in systems of disadvantage that are almost impossible to transcend."[12] Moreover these critiques are not just issues of theory. These fallacies are manifest in the state of American law and policy.

[10] EICHNER, *supra* note 2, at 17. Fineman makes clear that in her view notions of autonomy "defined in terms of expectations of self-sufficiency" dominates our political discourse. Fineman, *Vulnerable Subject*, *supra* note 2, at 259.

[11] EICHNER, *supra* note 2, at 21.

[12] Fineman, *Vulnerable Subject*, *supra* note 2, at 257.

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1. The Failure to Account For and Respond to Dependency

The first broad critique is that this political discourse, as manifest in U.S. policy, fails almost entirely to account for the way that families, broadly defined, meet the dependency needs of its members. Adults in families care for the young and old, and adult members care for each other in a myriad of ways. And, in a phenomenon termed "derivative dependency," when the caretakers, who are almost always women, provide this care work they do so at the expense of their own ability to be those idealized economic actors.[13]

A few examples make this point evident. In the last several decades we have experienced radical shifts in the nature of work and family. The conceptual ideal of the two parent family with one breadwinner barely exists and in fact never existed as a significant presence in large swaths of communities of color. Nevertheless it still forms the conceptual basis for many work related policies. Today, 70% percent of children live in households where all parents in the household, be there two or one, work. Despite these radical shifts in the nature of family and work, the workplace has barely shifted to accommodate these changes. In fact, as Eichner notes, "a comparison of policies in 173 countries found that when it came to parental leave protections in the workplace, the United States came in dead last, tied with only three other countries: Liberia, Papua New Guinea and Swaziland."[14] In addition to facing a workplace that is tremendously inflexible, American workers are consistently called on to work far more hours than those in other western countries.[15] Adding to the difficulties created by the lack of flexible workplace policies and long hours is the absence of high quality affordable care. Although children who receive high quality care tend to fare quite well, due in large part to the extraordinarily low compensation offered to those who engage in paid care work, the vast majority of available childcare is lightly regulated and of low quality.[16]

Women who both work and fulfill caregiving roles find themselves

[13] FINEMAN, THE AUTONOMY MYTH, *supra* note 2, at 34-37.

[14] EICHNER, *supra* note 2, at 27 (citing Jody Heyman, Alison Earle, Jeffrey Hayes, *Project on Global Working Families, The Work, Family and Equity Index: How Does the United States Measure Up?* (2007), available at http://www.mcgill.ca/ihsp/sites/mcgill.ca.ihsp/files/WFEI2007FINAL.pdf (last visited December 29, 2012)).

[15] EICHNER, *supra* note 2, at 39-40.

[16] *Id.* at 40.

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lagging behind on a variety of economic indicators. While women in couples struggle to maintain economic equality, single women raising children face harsher circumstances and harder choices. They generally must attempt to balance care work with employment, but the lower they are on the economic ladder, the more difficult this balance and the harsher the consequences should their carefully calibrated work and care plans fall apart. For the poorest women, who are disproportionately women of color, attempting to provide care for their own dependent children and family members, all these statistics and policies are significantly worse. Low wage workplaces tend to be less flexible and more precarious than those higher on the economic ladder. The extraordinary expense of childcare and the lack of any significant effort to subsidize that care force women into unstable and often unsuitable childcare arrangements and into a set of arrangements that are nearly guaranteed to fail. And whereas prior to the 1996 Welfare Reform Act, some women could rely on Aid to Families With Dependent Children to provide some level of support should they choose or be forced into unemployment, today the combined impact of work requirements, time limits, and the extraordinary push in many states to eliminate welfare, make the choices poor women face all the more difficult. Moreover, as wealthier women seek to meet the care needs of their families, they employ poor, disproportionately immigrant women, and provide them with generally low wages and even fewer benefits.

In short, despite the ideal of an autonomous adult actors and a family that is supposed to provide care work, the reality is that meeting these obligations is extraordinarily difficult. It is, for both Fineman and Eichner, our autonomy-centered political rhetoric that allows the state to fail to intervene to provide additional support:

> [The] assumptions—that individual liberty and equality are appropriately recognized by law, that dependency is not a condition that law needs to recognize; that the state should be neutral on issues of family; and that the state should not adulterate families internal dynamics—prevent policies that effectively support families.[17]

2. The Failure to Account for and Respond to Structural Inequality

The second theoretical and practical critique of the way the

[17] *Id.* at 27.

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autonomous subject drives policy focuses on structural inequality. As Fineman aptly puts it, in our society "[p]rofound inequalities are tolerated – even justified – by reference to individual responsibility and the working of an asserted meritocracy within a free market."[18] We are a nation characterized by profound economic inequality, inequalities that are again more starkly felt in communities of color.

Although an in depth discussion of the profound inequities woven into our current society is well beyond the scope of this article, a few statistics serve as a potent reminder of these phenomena. Since the 1970s, the income gap between those at the bottom and those at the top has continued to widen, with an ever-smaller share going to those at the bottom and in the middle and more going to those at the top. According to the Congressional Research Service, "… the U.S. income distribution appears to be among the most unequal of all major industrialized countries and the United States appears to be among the nations experiencing the greatest increases in measure of income dispersion."[19] Looking in particular at African Americans, who are disproportionately affected by the social welfare policies examined in Section III of this article, reveals significant income disparities between blacks and whites. For example, sixty five percent of blacks studied in the most recent PEW Charitable Trust Economic Mobility Project report, "were raised at the bottom of the income ladder compared with only 11 percent of whites."[20]

In addition, although the popular rhetoric about autonomy might suggest that it is quite possible, by hard work and effort, to move up the economic ladder during one's lifetime, Congressional Research Service claims that "empirical analysis suggests that children born into

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[18] Fineman, *Vulnerable Subject*, *supra* note 2, at 251 (Fineman's critique is aimed squarely at the failures of Equal Protection doctrine. In this piece and in a prior piece on vulnerability, Fineman, *Anchoring Equality*, *supra* note 2, Fineman indicts the doctrine for its utter failure to provide any means to realize substantive equality. This article draws on Fineman's work on vulnerability, however, not to engage in the important debates around how that theory might add to Equal Protection analysis but for its description of the theory and practice of the state as it operates in American society.

[19] Linda Levine, *The U.S. Income Distribution and Mobility: Trends and International Comparisons*, CONG. RESEARCH SERV., summary (2012), www.fas.org/sgp/crs/misc/R42400.pdf (last visited Feb. 12, 2013).

[20] Econ. Mobility Project, *Pursuing the American Dream: Economic Mobility Across Generations*, THE PEW CHARITABLE TRUSTS, 18 (2012), www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pursuing_American_Dream.pdf. [Hereinafter *Pursuing the American Dream*].

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low-income families have not become more likely and may have become less likely to surpass their parents position at the bottom of the income distribution."[21] In fact, according to recent data, only four percent of those raised in the bottom fifth of household earnings make it all the way to the top quintile.[22] In contrast, 43% of Americans raised in the bottom fifth will remain there as adults.[23] Blacks are also significantly more likely to be stuck at the bottom than whites. "More than half of black adults (53 percent for family income and 50 percent for family wealth) raised at the bottom remain stuck there as adults, but only a third of white (33 percent for both) do."[24]

Despite these and other clear inequalities woven into our society along lines of gender, class, and race, our social policy does little to nothing to address these inequalities. Instead, and this is the heart of the critique of what Fineman terms The Autonomy Myth,[25] American social policy is largely "unresponsive to those who are disadvantaged, blaming individuals for their situations and ignoring the inequity woven into the systems in which we are all mired."[26]

B. Towards a More Responsive State

The social policy and jurisprudence that results from this constricted view of autonomy justifies and gives rise, in Fineman and Eichner's view, to a non-responsive state.[27] "… [T]he same problematic assumptions that are embodied in political theory are also

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[21] Levine, *supra* note 19, at 14.
[22] *Pursuing the American Dream*, *supra* note 20, at 6.
[23] *Pursuing the American Dream*, *supra* note 20, at 3.
[24] *Id.* at 20.
[25] FINEMAN, THE AUTONOMY MYTH, *supra* note 2.
[26] Fineman, *Vulnerable Subject*, *supra* note 2, at 257.
[27] By characterizing their collective description of the state as absent and unresponsive, I do not mean to suggest that either author fails to acknowledge that means by which law and social policy constitute both the family and the overlapping means by which dependency needs are met or unmet. In fact, both authors clearly acknowledge the way that law shapes the very nature of the family. *See*, *e.g.*, EICHNER, *supra* note 2, at 55-57 (2010) ("Just as there is no natural, pre-political family, there are no natural, pre-political ways in which families function. In today's complex society, the ways in which families function are always deeply and inextricably intertwined with government policy." (citing Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 MICH. J. L. REFORM 835, 836 (1985)). *See also* FINEMAN, THE AUTONOMY MYTH, *supra* note 2, at 151 ("While the family may be viewed as private in our rhetoric, it is highly regulated and controlled by the state.").

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present in US law."[28] If, rather than accepting this constrained view of autonomy and non-responsive state, the "primary objective [was instead] ensuring and enhancing a meaningful equality of opportunity and access, we may see a need for a more active and responsive state. . . ."[29] This envisioned state would not, "simply protect citizens' individual rights from violation by others." Instead it would "actively support the expanded list of liberal goods by creating institutions that facilitate caretaking and human development."[30] This envisioned state would also move past constrained notions of formal equality towards a much more robust and substantive demand on state institutions to create the possibility for real equality. The "primary objective [would be] ensuring and enhancing a meaningful equality of opportunity…"[31]

The non-responsive state manifests itself in two primary ways: first in its failure to regulate the workplace in ways that allow families to balance employment and caretaking and second in the constricted and punitive ways in which it provides assistance to those in need. The envisioned state would be restructured to respond in both these areas.

1. The Failure to Regulate the Market and Regulation of the Market in the Supportive State

The state's failure to regulate the market is a central concern of the theory of the supportive state. With a few limited exceptions,[32]

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[28] EICHNER, *supra* note 2, at 27.
[29] Fineman, *Vulnerable Subject*, *supra* note 2, at 260.
[30] *Id*. Although Fineman frames it differently, and again focuses more squarely on the failures of equality doctrine to meet the challenges of structural inequality, Fineman's framing is similar. In her terms,

> …. [C]onsideration of vulnerability brings societal institutions, in addition to the state and individual into discussion and under scrutiny. . . . The nature of human vulnerability forms the basis for a claim that the state must be more responsive to that vulnerability. It fulfills that responsibility primarily through the establishment and support of societal institutions."

Fineman, *Vulnerable Subject*, *supra* note 2, at 255-56.
[31] Fineman, *Vulnerable Subject*, *supra* note 2, at 260.
[32] Eichner notes the existence of the Family and Medical Leave Act ("FMLA") as the only federal legislation specifically designed to address the ability of families to meet caretaking needs. Although tremendously important for what is does, FMLA is limited in both the employees it covers and the support it provides. In short the Act guarantees up to twelve weeks of leave for certain caretaking activities for approximately 50% of the workforce. Because it is unpaid, however, according to at

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American law provides comparatively few restraints on the market designed to support families in meeting the care needs of their dependents. The supportive state, in contrast, would "focus on limiting coercion by the market," and would enact policies to ". . . allow families the institutional space to make important decisions and to the accomplish important tasks without being completely beholden to the market."[33] For example, upper hour restrictions on work would be imposed, time off to meet caretaking needs would be expanded and compensated and workers would be allowed flexible work hours if needed to meet caretaking obligations.[34]

2. The Limited and Punitive Nature of the Safety Net and A Newly Envisioned Set of Supports

Current U.S. social policy provides a severely limited and highly punitive safety net for those in poverty. In order to receive the meager support offered by the state, poor women are stigmatized, forced to surrender their autonomy, and subjected to an extraordinarily punitive system as a price for meager support.[35] Eichner's devastating description of the operation of the current child welfare system provides a vivid example of how current social policy assumes autonomy as a baseline and stigmatizes and punishes those who fail to meet their own needs. Poor families receive little to no support in parenting successfully while attempting to survive the sometimes tremendously difficult conditions of poor communities and the low-wage labor market. The vast majority of interventions fall on the punitive and, for both the children and the families involved, devastating side. As a general matter, the state only enters when there is allegation of abuse or neglect. Once the state enters the vast majority of resources go not into supporting families to parent successfully but to moving children into foster care. Once in foster care, the vast majority of children fare very badly. And, as in the case in so many of these punitive systems, they focus these punitive resources overwhelmingly on communities of color. The consequence, as Dorothy Roberts has so thoroughly and persuasively

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least one estimate 78% of workers eligible for leave under the Act cannot take advantage of it because the of the associated loss in wages. EICHNER, *supra* note 2, at 36.

[33] EICHNER, *supra* note 2, at 64-65.

[34] EICHNER, *supra* note 2, at 64-65.

[35] Fineman, *Vulnerable Subject*, *supra* note 2, at 259 (". . . [T]hose who must resort to certain forms of state assistance are asked to surrender their autonomy (and privacy) and are stigmatized as dependent and failures.").

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demonstrated, is a concerted and often devastatingly effective attack on poor African American families.[36]

The supportive state would respond quite differently both for poor women and for women who are farther up on the economic ladder. In place of the current child welfare system, the supportive state would be "premised on the view that children's welfare is a concurrent rather than residual responsibility of the state, and that this responsibility [would be] best met through supporting families in the normal course of events."[37] The goal of such a state would be "supporting the development of flourishing children."[38] The supportive state then would seek to alleviate child poverty and would provide high quality early education and childcare,[39] sufficient access to low income housing,[40] and "policies that ensure access to mental health services and drug-treatment programs."[41] More generally, the supportive and responsive state would provide significantly more access to support for all families in the form of universal health care, subsidized childcare, and in some iterations, compensation for care work.[42]

II. Hyperregulation and Poverty

The political theories described above offer a tremendously productive reframing of the liberal subject and the role of the state and a strong vision of what the supportive or responsive state might entail. The idea of placing vulnerability, as opposed to constrained notions of autonomy, at the center of liberal theory creates a shift in the burden placed on the state. As Fineman frames it, "[t]he nature of human vulnerability forms the basis for a claim that the state must be more responsive to that vulnerability."[43] These theorists also clearly

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[36] *See infra.* notes 83-89 and accompanying text.

[37] EICHNER, *supra* note 2, at 123.

[38] *Id*. at 123.

[39] *Id.* at 123-124.

[40] *Id.* at 124.

[41] *Id*. at 124.

[42] Eichner and Fineman diverge to a certain extent on this issue. Fineman suggests, in THE AUTONOMY MYTH that care work should be publicly compensated. THE AUTONOMY MYTH, *supra* n. 2 at 285-87. Eichner rejects this proposal. THE SUPPORTIVE STATE, *supra.* n. 2 at 76-77. It is important to note that Eichner and Fineman also both devote substantial parts of their analysis to the crucial questions of how the supportive state should support women's equality. For example, Eichner suggests policies that would encourage both men and women to provide care work. *Id.* at 82-83.

[43] Fineman, *Vulnerable Subject*, *supra* note 2, at 255-56.

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understand and acknowledge that poor women, and disproportionately communities of color, are stigmatized and punished in the current social welfare system. Their revision of the subject, privacy and dependency, if adopted, would likely result in some movement towards eschewing the stigma currently associated with seeking support.

My concern is not that these theorists fail to pay attention to how poor women are treated. In fact to varying degrees these realities are in fact described in their work. Instead, I want to argue, as a next step, for a heightened focus on the specificity of the mechanisms of support as they currently operate in low income communities. This focus is crucial because it seems very possible, given the repeated marginalization of poor women of color within some of feminist theory,[44] that unless these issues are foregrounded, the appeal of the narrative of the state as it operates for those not in poverty could easily dominate the development of this work. This possibility would leave uninterrogated and untouched those wide swaths of policy that uniquely and disproportionately impact poor communities in general and poor communities of color specifically. In this scenario, the important task of realizing a more supportive state could easily focus on creating legal structures to facilitate caretaking for some at the expense of interrogating and dismantling the punitive and hyperregulatory mechanisms of the those parts of the state targeted at poor women generally and poor women and communities of color specifically.[45]

A variety of sources, from critical race theory, history and sociology provide a rich context for understanding the mechanisms of the state as they function specifically in poor communities. In particular, some specifics from the history of social welfare policy in the United States explain the bifurcation of support systems in U.S. social policy, splitting our safety net into one for those in poverty and another for everyone else. In addition recent discussions within both

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[44] *See infra* note 1 and accompanying text.

[45] One example of this phenomena in popular discourse was clear from the extraordinary focus, among professional women on the publication of Anne Marie Slaughter's *Why Women Still Can't Have It All*, THE ATLANTIC, July/August 2012, *available at* http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020. For some coverage on the response to the article, see links embedded in Anne Marie Slaughter, *The "Having it All" Debate Convinced Me To Stop Saying "Having it All,"* THE ATLANTIC.COM (July 2, 2012, 9:11AM), http://www.theatlantic.com/business/archive/2012/07/the-having-it-all-debate-convinced-me-to-stop-saying-having-it-all/259284/).

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sociology and law, describing the status of privacy rights in poor communities and the means by which legal and social welfare systems, both civil and criminal, intersect to control poor communities of color provide an essential framework.

A. A Bit of Social Welfare History

As has been well told elsewhere, at the advent of the New Deal the United States made a crucial set of decisions about how to structure its welfare state. Very roughly speaking, the set of supports created in the 1930s and then significantly expanded and reconfigured during 1960s and the Great Society were split in two.[46] One set of supports was created for a group viewed as workers and therefore deserving of support. These programs, like Social Security and Medicare, did not have income cut offs. Although of course certain categories of workers were originally excluded,[47] this category of social supports were created and remain in place for those who, politically speaking, paid into the system.[48]

During the same period (starting during the New Deal and continuing through the 1960s) another very different set of supports were created for some in poverty: those deemed worthy of support but still poor and in need not just of support but, so the dominant political consensus dictated, of behavioral control.[49] Originally Aid to Dependent Children was created primarily to enable poor white widows to remain in their homes and care for their children. This program was, like poverty programs that preceded it, focused strongly on controlling the behavior of its recipients. Later, during the War on Poverty and the Great Society, programs like Food Stamps and Medicaid were added to those programs exclusively for those in or near poverty. The poverty programs have been, since their very inception, focused on scrutinizing and controlling the behavior of recipients. Moreover, as AFDC was transformed, in the 1960s, as the result of extensive activism and litigation, from a program primarily

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[46] *See* MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A HISTORY OF WELFARE IN AMERICA 236-39 (1986).

[47] *See* LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890- 1935, 5 (1994).

[48] Dorothy Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers' Decision About Work At Home and in the Marketplace*, 44 SANTA CLARA L. REV. 1029, 1032 (2004).

[49] For a discussion of the historical origins of this split in U.S. social welfare policy and their relationship to who was "deserving," see *id.* at 238-39.

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for poor white widows to a program open to poor communities of color, the nature of extent of behavioral controls became inextricably linked to structures of racial subordination.[50]

B. Privacy Deprivation and Criminalization as the Price of Support

Social and behavioral control in American poverty programs is often accomplished through privacy incursions almost unimaginable in the regulatory framework of support programs provided to those of means. Although one could scarcely imagine policies like this as a condition of receipt of benefits such as the child care or home mortgage tax deductions, poverty programs regularly invade both the homes (and more recently the bodies)[51] of poor people as a condition of support. The jurisprudential approval of these practices began in the Supreme Court's decision in *Wyman v. James*.[52] At issue in that case was a New York State requirement that welfare recipients consent to a home inspection as a condition of eligibility. The plaintiffs argued that while the State was clearly entitled to gather all information relevant to establishing Ms. James' eligibility for AFDC, it could not abrogate her Fourth Amendment right against unreasonable searches of her home as a condition of her eligibility for AFDC. Despite the fact that a applicant or recipient who, by definition, has no other means of support must consent to the search or lose the that support, the Court held that the requirement did not violate the Fourth Amendment right to be free from unreasonable searches and seizures.[53] In dissent Justice Douglas states clearly the class distinction at the heart of the majority opinion:

> If the welfare recipient was not Barbara James but a prominent, affluent cotton or wheat farmer receiving benefit payment for not growing crops, would not the approach be different? Welfare in aid of dependent children . . . has an aura of suspicion. There doubtless are frauds in every sector of public welfare whether the recipient be a Barbara James or someone who is prominent or influential. But constitutional rights –

[50] *See generally* QUADAGNO, *supra* note 1. For commentary on the activism of African-American women in the Welfare Rights Movement during this period that includes extensive discussions of the relationship between the Welfare Rights and Civil Rights movements, see FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA (2007).

[51] *See infra* notes 188-198 and accompanying text.

[52] *Wyman v. James*, 400 U.S. 309, 317 (1971).

[53] *Id.* at 317.

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> here the privacy of the home – are obviously not dependent on the poverty or on the affluence of the beneficiary; and their privacy is as important to the lowly as to the mighty.[54]

Justice Douglas's views, however did not hold sway. In fact, in recent years, scholars have carefully detailed the way that poverty-focused social welfare programs increasingly offer proof both that poor people hold no genuine right to privacy once they seek support and that, more and more frequently, poverty focused social welfare programs employ the methods and modalities of the criminal justice system. These two related conclusions are strongly articulated in the work of Khiara Bridges and Kaaryn Gustafson.

Khiara Bridges's work on New York State's Prenatal Care Assistance Program ("PCAP") program provides strong support for her thesis that the suggestion that poor women exchange their privacy rights for support significantly understates the problem. Bridges centers her analysis around the extraordinary amount of information collected from low-income women as a price of PCAP. In that program, as Bridges extensively documents, poor women seeking prenatal care are forced to provide extensive information to a wide variety of professionals (nurses, social workers and the like) about subjects ranging from her diet, her income, her history with child welfare agencies, her immigration status, her mental health history, her relationship history, any history of violence, her use of contraception and her parenting plans, all well before she accesses this support. As is the case in the examples in Section III of this article, in the PCAP setting, the effect is that "poor women's private lives are made available for state surveillance and punitive state responses and they are exposed to the possibility of punitive state responses."[55] Bridges concludes that rather than bartering their privacy for benefits, it is more accurate to state that, in our current socio-political and legal environment, poor families have no privacy rights to begin within.[56]

Kaaryn Gustafson's work on the criminalization of welfare adds another crucial piece to the framework for understanding the current administrative modalities of poverty programs. Gustafson demonstrates in extraordinary detail that today, "[w]elfare rules

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[54] *Id.* at 332-33.

[55] Khiara Bridges, *Privacy Rights and Public Families*, 24 HARV. J. L. & GENDER 114, 131 (2011).

[56] *Id.* at 173.

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assume the criminality of the poor . . . [and] the logics of crime control now reign supreme over efforts to reduce poverty or to ameliorate its effects."[57] Gustafson provides ample evidence for these claims. The expanding reach of the criminal justice system is manifested in social welfare programs in at least two ways: first, in the use of the mechanisms and modalities of the criminal system within the benefit application process; and second, in the increasing use of the welfare system as an extension of law enforcement. Leading the trend toward rendering the welfare system analogous to the criminal justice system is the use of biometric imaging technology. In response to a series of federal studies revealing some instances of receipt of benefits in more than one jurisdiction by individuals, the 1996 welfare reform law "required states to institute fraud prevention programs."[58] Several states instituted a program of biometric imaging in which, in most cases, applicants' fingerprints and possibly photographs are scanned and then run through a variety of state and federal databases, purportedly to detect instances in which recipients are attempting to "double dip" by receiving benefits in more than one jurisdiction.[59] Even before these systems were in place, instances of welfare fraud in the form of double dipping were characterized more by infamous individual instances rather than by any data showing a widespread practice. Today, given the extensive system of data cross-checking now in place, these processes are even more unlikely to and in fact do not actually uncover significant instances of welfare fraud.[60] But, as Gustafson observes, biometric imaging "serves another purpose: the collection of biometric data scrutinizes and stigmatizes low-income adults in a way that equates poverty with criminality."[61] In these states, because of the extensive interviewing, data checks, and finger

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[57] KAARYN GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 1 (2011).

[58] *Id.* at 56.

[59] *Id.* at 56-57.

[60] For example, in California, the state identifies only three matches per month and refers only one of these cases per month for more extensive fraud investigation. *Id.* at 57. Although policymakers claim that the purpose of these programs is to as much to deter as to detect fraud, there is also extensive evidence that it deters not fraud but applications of needy individuals. *Id.* at 57-58. Policymakers continue to persist in requiring finger imaging despite extraordinary evidence of its high cost and low utility in detecting fraud. For example, according to a report evaluating its effectiveness in Texas, one study found that it failed to reduce caseloads, cost the taxpayers $15.9 million between its implementation in 1996 and 2000, and, over the same period, 'resulted in only nine charges filed by the DA, 10 administrative penalty cases, and 12 determinations of no fraud.'" *Id.* at 58 (citations omitted).

[61] *Id*. at 57.

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imaging, "applying for welfare mirrors the experience of being booked for a crime."[62]

In a related trend, it is quite clear that, post 1996, the welfare system has been employed as yet another tool in criminal law enforcement. This is manifested in several ways. First, post 1996, law enforcement officials need merely ask for public benefit records in order to receive them. Absolutely no legal process is required.[63] This allows law enforcement agencies to use the extensive personal information held within these databases for investigation and prosecution of crimes. Beyond this, there have been several instances in which welfare agencies have collaborated with law enforcement to apprehend individuals for reasons utterly unrelated to their public benefits. For example, under a program called Operation Talon, Food Stamp[64] offices collaborate with law enforcement to apprehend individuals with outstanding warrants. After a computerized match is run between the relevant databases, individuals receive a pretextual letter asking them to come in to discuss an issue concerning their benefits. When they arrive, they are met by law enforcement and arrested. Between 1996 and September 20, 2009, 14,645 individuals were arrested under this program.[65]

This article will argue, in Section IV, that remembering the fundamental structural divide in U.S. social welfare policy, the wholesale lack of privacy rights and the remarkable criminalization of support, with the inextricable ties to racial subordination embedded in all these trends, is crucial to conceptualizing a path to the supportive state.

C. From Less Eligibility to Hyperregulation

In 1971, Frances Fox Piven and Richard Cloward published

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[62] *Id*.

[63] *Id*. at 54 (citing 7 U.S.C. 2020(e)(8) and 42 U.S.C. 1437z).

[64] In 2008, the Food Stamp Program was renamed and is now called Supplemental Nutrition Assistance Program or SNAP. *See* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, §4001(b), 122 Stat. 1651 (2008). Nevertheless for the purposes of name recognition this article continues to use the more well-known term "Food Stamp."

[65] *Hearing to Review Quality Control Systems in the Supplemental Nutrition Assistance Program Before the H. Subcomm on Dep't Operations, Oversight, Nutrition, and Forestry of the H. Comm. on Agric.*, 111th Cong. 28 (2010) (statement of the Hon. Phyllis K. Fong, Inspector General, U.S. Dep't of Agric.). For more information on Operation Talon *see* GUSTAFSON, *supra* note 57, at 54.

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Regulating the Poor, a ground-breaking treatise that would shift the way that left scholars talked about U.S. poverty policy. Piven and Cloward argued that "relief programs are initiated to deal with dislocation in the work system that lead to mass disorder, and are then retained . . . to enforce work."[66] Highlighting current manifestations of the age-old social welfare theory of *less eligibility*,[67] Piven and Cloward persuasively chronicled the systematic expansion and contraction of public aid as a mechanism to keep workers vulnerable and beholden to the vagaries of the low wage labor market. Loïc Wacquant has recently and persuasively argued, however, that it is no longer sufficient to analyze the operation of the social welfare state in isolation. Instead Wacquant and others urge us to widen the frame and see how both social welfare and criminal justice mechanisms interweave to control poor communities. As Wacquant frames it,

> . . . [T]his cyclical dynamic of expansion and contraction of public aid has been superseded by a *new division of the labor of nomination and domination of dependent populations* that couples welfare services and criminal justice administration under the aegis of the same behaviorist and punitive philosophy. The activation of disciplinary programs applied to the unemployed, the indigent, single mothers, and others "on assistance" so as to push them onto the peripheral sectors of the employment market, on the one side, and the deployment of an extended police and penal net . . . on the other side, are the two components of a single apparatus for the management of poverty that aims at effecting the authoritarian rectification of the behaviors of populations recalcitrant to the emerging economic and symbolic order.[68]

Wacquant thus insists that the U.S. social welfare state operates as one of two interlocked systems that work together to discipline those who threaten the neoliberal economic order.[69] In his terms, "workfare" and

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[66] FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE xvii (updated ed. 1993) (1971).

[67] "Less eligibility" describes the principle, long established within social welfare policy, that any means of support offered to the poor should leave them in circumstances worse than those they would face if participating in the market. *See id.* at 35. For a historical description of this concept, see *id.* at 35-36.

[68] LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 14 (2009).

[69] Wacquant genders the two systems (penal and social welfare) female and male respectively. *Id.* at 14-15. Although this article does not focus on the question

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"prisonfare" are inextricably linked.[70] And those disciplined are, of course, raced black, both actually and as a matter of symbolic ordering.[71]

Frank Rudy Cooper recently noted that Wacquant also offers valuable terminology for describing the targeted nature of these interlocking systems. Cooper, citing Wacquant, recently argued that we should use the prefix "hyper" as opposed the descriptor "mass" to describe the phenomena of incarceration in poor, urban communities of color in the United States. Cooper notes that the use of the prefix "hyper"

> is not generalized, but targeted . . . .[H]yper-incarceration should be seen as a multidimensional attack on a specific group of people. Wacquant reveals that hyper-incarceration has "been finely targeted, first by class, second by that disguised brand of ethnicity called race, and third by place." The class targeted is, of course, the poor. The races targeted are, of course, blacks and then Latinos/as. The place targeted is the inner city.[72]

While Wacquant is referring here to the targeting of penal policies, for the purposes of this article I use the prefix "hyper" and the term "hyperregulatory state" to describe a wide ranging set of mechanisms

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of the gender of the penal arm as Wacquant describes it, the gendering of the penal system as male is problematic in its elision of one of the fastest growing incarcerated populations, poor women of color. For a broad ranging discussion of the implications of this trend, see the symposium issue recently published by the UCLA Law Review entitled *Overpoliced and Underprotected: Women, Race and Criminalization*, 59 UCLA L. REV. 1418 (2012). As described by Kimberle Crenshaw, whose article introduces the volume, "[m]ore than simply adding women of color into the mix, this symposium interrogates the terms by which women are situated both within the discourse of mass incarceration as well as within various systems that overlap and that contribute to the vulnerability of racially marginalized women." Kimberle Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race and Social Control*. 59 UCLA L. REV. 1418, 1422 (2012).

[70] WACQUANT, *supra* note 68, at 79.

[71] *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN AN AGE OF COLORBLINDNESS (2010) (showing that the criminal justice system and its associated civil feeder and postincarceration classifications systems serve to strip black communities of their freedom and of the fundamental privileges of citizenship and to recreate, in Alexander's terms, a New Jim Crow).

[72] Frank Rudy Cooper, *Hyper-Incarceration as a Multidimensional Attack: Replying to Angela Harris Through The Wire*, 37 WASH. U. J. L. & POL'Y. 67, 68-69 (2011) (quoting Loïc Wacquant, *Racial Stigma in the Making of America's Punitive State*, *in* RACE, INCARCERATION, AND AMERICAN VALUES 57, 59 (2008)).

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imbedded primarily in the social welfare state that, like the mechanism Wacquant describes, are targeted, by race, class, place (and, I add, gender) to control and subordinate poor communities in general and poor communities of color in particular.

In addition to widening the frame and defining terms, we also need to focus sharply on the details of these "structural and institutional intersections."[73] As Dorothy Roberts's work continually reminds us, describing "particular systemic intersection[s] . . . help[s] elucidate how state mechanisms of surveillance and punishment work to penalize the most marginalized women in our society."[74] We must, in short, look at these intersections from the ground up.

In my review of the work of scholars such as Bridges and Gustafson I have already described some of the mechanisms that could be described as mechanisms of the hyperregulatory state. The following section turns to one less-explored piece of this puzzle: outlining the mechanisms of regulatory intersectionality[75] as it manifests when poor people seek assistance from some of the most basic social support mechanisms that exist in the United States: public health and welfare. In each example, information that is deemed to indicate non-compliant and/or deviant conduct travels, from the original social welfare system into other even more punitive systems.

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[73] Crenshaw, *supra* note 69, at 1427. Crenshaw uses the term "structural-dynamic discrimination" to describe "intersections [that] are constituted by a variety of social forces that situate women of color within contexts structured by various social hierarchies and that render them disproportionately available to certain punitive policies and discretionary judgment that dynamically reproduce these hierarchies." She uses the term "intersectional subordination" to describe "outcomes produced in the interface between private institutional configurations such as the housing market or neighborhood watches and the policing power of state actors." *Id.*

[74] Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1476 (2012).

[75] Dorothy Roberts uses the term "system intersectionality" to describe how the policies of the child welfare and criminal justice system work together to perpetuate the subordination of poor African American women. Roberts, *supra* note 74. The focus here is slightly different. While Roberts' analysis looks at how a variety of policies, such as incarceration for low level drug offenses and the emphasis on adoption in the Adoption and Safe Families Act work together to lead to African American women losing their children, the analysis here looks at a particular kind of intersections whereby information travels from one regulatory system to another, resulting in heightened consequences for the person seeking support. In addition the word regulatory (as opposed to system) calls attention to the focus here on the myriad of detailed structures that lead to the devastating punitive outcomes described in Section III. Having said that, however, the terms are clearly closely related.

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It is in large part through the mechanisms of these processes that the systems work together to impose ever heightening penalties on the families that seek assistance.[76]

To understand the impact of regulatory intersectionality (and the broader concept of the hyperregulatory state) on the theory and path to realization of a more responsive or supportive state, it is important to understand both whom these policies impact and how those impacts shape the perception of the users of the U.S. social welfare system. In every system described below, be it the social welfare settings (public health and welfare) or the systems into which data is transmitted and further punishment imposed (child protection and criminal justice), these systems disproportionately serve and target poor communities which are, in turn disproportionately composed of African American families. Moreover, as other scholars have amply demonstrated, both the child welfare and the criminal justice systems contribute to the destruction of poor Black communities and families and the recreation of a racial caste-like system. This article takes those arguments to be true.[77] However, it is not necessary, for the purposes of this article, to

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[76] It is important to note that each of these phenomena could be and in some cases has been studied in more detail than is presented here. For example, Kaaryn S. Gustafson's CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY (2011) provides a detailed and extensive description of how welfare programs are characterized by both assumptions of latent criminality among recipients and extensive interactions between the welfare and criminal justice systems. John Gilliom's OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE AND THE LIMITS OF PRIVACY (2001) provides an astounding look at the mechanisms of surveillance and data sharing that dominate public assistance programs and fuel welfare fraud prosecutions. Similarly, Dorothy Roberts has for many years been tracing the means by which poor Black women, through the wielding of racial tropes, the geography of race and poverty and the disproportionate targeting of their communities, face interlocked public health, child welfare and criminal systems that expose them to escalating punishments and reinforce the U.S. racial hierarchy. *See, e.g.*, DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002) [hereinafter ROBERTS, SHATTERED BONDS]; Roberts, *supra* note 73; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy* 104 HARV. L. REV. 1419 (1991) [hereinafter Roberts, *Punishing Drug Addicts*]. The point of this article is not to reproduce these descriptions and analysis, but rather to build on them and, more specifically, to begin to draw attention to the pervasive nature of intersectional regulation across social welfare settings and beyond.

[77] The literature on the topic of race and the criminal justice system is extensive. For a compelling description of the way that mass incarceration and its concomitant over-policing, targeted prosecution and post-conviction civil consequences operate to institute a system of racial caste in American society, *see* ALEXANDER, *supra* note 71. For a devastating chronicle of the impact of punitive child welfare policies on

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re-prove those well-substantiated claims. Here only two specific pieces of this larger argument are crucial. First, it is important simply to understand that the systems at issue affect poor, African American communities disproportionately. Second, it is important to understand both the validity and widespread existence of the perception within poor communities of the child welfare and criminal justice systems as tools of racial subordination. It is justified perceptions like these and the mechanisms of heightening punishment described below that make them important for realizing the supportive state. Indeed, these perceptions and realities matter a great deal if we are, as this Article proposes, to center the experiences of poor African American women in our analysis of how the state currently operates and how we might theorize a path from its current operation to a more responsive state. Below is a brief summary of the data that underlies the claim of disproportionate representation and disproportionate negative impact.

D. Race, Gender and Poverty in Social Welfare, Child Welfare and Criminal Justice Settings

In both examples described in Section III, clients enter a particular social welfare setting: public health and welfare. As a result of that entrance, the original social welfare system comes to the conclusion that the person has broken some rule of the system or has engaged in what actors in the system or system policies define as deviant or dangerous conduct. In both systems, the conduct leads to some overt sanction within the social welfare setting: in the example of public health, an overt deterrence to accessing prenatal care and in the welfare setting, a denial of benefits.[78] The punishment, however, does not cease with the imposition of those penalties. The information about that person or that family then travels from that system to another, resulting in ever-heightening negative consequences for some or all members of the family. In both examples, the information flows from the social welfare setting to the child protection agency and, in some circumstances, to the criminal system. In each of these systems

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poor African American children and families, *see generally* ROBERTS, SHATTERED BONDS, *supra* note 76. For a discussion of the way that child welfare and criminal justice systems work together to devastate black families, *see* Roberts, *supra* note 74.

[78] In the public health setting, the fact that a pregnant mother tests positive for drugs does not lead overtly to a sanction within the public health system. For example, unlike in the welfare context, that mother is not subject to a rule that would deny her health benefits as a result of that test. Instead, in that setting, the punishment comes with the transmission of information from the public health to the child welfare and criminal systems.

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(social welfare, child protection, and criminal justice), poor African American people are disproportionately represented.

Of the two social welfare settings considered below, one serves, by definition, only those in poverty.[79] Although, under the terms of the federal Temporary Assistance to Needy Families Program, states have broad discretion to design their programs, a central purpose of the program is, "to provide assistance to needy families."[80] In contrast although the health care facilities that serve pregnant women are by definition open to all, by virtue of geography and the race and class stratification of the health care system in the U.S., these setting serve, disproportionately, poor communities of color.[81]

Analyzing these systems at their intersections reveals legal mechanisms that facilitate and, in some cases, mandate the transmission of information about poor clients from the social welfare setting into other, even more intrusive and punitive regulatory systems. In particular, both social welfare settings are structured to facilitate the transmission of purportedly negative information about clients from the social welfare setting into the agencies of the child welfare and criminal justice systems, thereby imposing escalating punitive consequences on those who seek support. The disproportionate representation of poor African American men, women and children in both child welfare and criminal systems and the means by which these systems work to perpetuate the subordination of poor African American communities in the U.S. has been extensively and compellingly chronicled elsewhere.[82] Nevertheless, because of the way

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[79] In using the term poverty, it is crucial to note that those who fall below the poverty line are very, very poor. The U.S. poverty measure has been widely criticized as inaccurate and outdated. *See* Wendy A. Bach, *Governance, Accountability and the New Poverty Agenda*, 2010 WIS. L. REV. 239, 278-79.

[80] 42 U.S.C. §601(a)(1) (YEAR).

[81] *See Unequal Outcomes in the United States: Racial and Ethnic Disparities in Health Care Treatment and Access, the Role of Social and Environmental Determinants of Health, and the Responsibility of the State*, CERD WORKING GROUP ON HEALTH AND ENVIRONMENTAL HEALTH, (Jan. 2008), http://www.prrac.org/pdf/CERDhealthEnvironmentReport.pdf (last visited Feb. 4, 2013).

[82] For a concise description of these phenomena as they impact African American women in particular, see Geneva Brown, *The Intersectionality of Race, Gender and Reentry: Challenges for African American Women*, THE AMERICAN CONSTITUTIONAL SOCIETY FOR LAW AND POLICY (Nov. 2010), http://www.acslaw.org/files/Brown%20issue%20brief%20-%20Intersectionality.pdf (last visited Jan. 10, 2013). On the issue of racial disproportionatity in the criminal

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that regulatory intersectionality facilitates this subordination, it is important to review these arguments here.

As to the child welfare system, Dorothy Roberts's seminal work leaves little doubt that the child welfare system is "a state-run program that disrupts, restructures, and polices Black families."[83] Her work also leaves little doubt that "[b]lack families are being systematically demolished"[84] by that system. A few statistics paint this picture clearly. Although the cause of overrepresentation is disputed, it is beyond dispute that African American children are far more likely to be subject to child welfare intervention than are white children[85] and that poor children, who are disproportionately African American, are also far more likely to be subject to intervention than children who are not poor.[86] For example, in 2008, while African American children were only 14% of the total population, they were 31% of the percentage of children in foster care.[87] It is also beyond dispute that African American children and African American families fare far worse than their white counterparts once they come to the attention of child welfare authorities. As Roberts systematically chronicles in *Shattered Bonds*, black children are more likely to be separated from their parents, spend more time in foster care, and are receive inferior services.[88] Although it is difficult to capture the extraordinary presence of child protection agencies in the lives of poor Black families today, the fact that "[o]ne out of twenty two Black children in New York City is in foster care" and, "one out ten children [in the low income neighborhoods of Central Harlem is] . . . in foster care"[89] gives some sense of the incredible depth of this presence and its impact on these communities.

As to the criminal justice system, although many have long documented the extraordinary negative impact of the War on Drugs and hyper-incarceration on poor African American communities,

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justice system *see* ALEXANDER, *supra* note 71.

[83] ROBERTS, SHATTERED BONDS, *supra* note 76, at viii.

[84] *Id.* (emphasis omitted).

[85] Child Welfare Information Gateway, *Addressing Racial Disproportionality in Child Welfare*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES 3 tbl. 2 (Jan. 2011), https://www.childwelfare.gov/pubs/issue_briefs/racial_disproportionality/racial_disproportionality.pdf (last visited Jan. 10, 2013).

[86] EICHNER, *supra* note 2, at 120-21.

[87] *Id.* at 3.

[88] ROBERTS, SHATTERED BONDS, *supra* note 76, at 9.

[89] *Id.* at 9.

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Michelle Alexander's *The New Jim Crow* has captured public imagination on this issue as perhaps no other work has before it. Paralleling Roberts's work on the way that the child welfare system targets African American communities, Alexander persuasively argues that the criminal justice system writ large (including the full gamut of systems from over-policing in poor African American neighborhoods, through prosecution and plea bargaining, incarceration and post-conviction collateral consequences),

> . . . creates and maintains racial hierarchy much as earlier system of control did. Like Jim Crow (and slavery), mass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race.[90]

It is in part through the mechanisms of regulatory intersectionality that the social welfare systems described below feed negative information about poor women and children out of the already punitive social welfare setting into these even more harmful and punitive systems.

III. Regulatory Intersectionality

To examine in detail the interactions (or intersections) between social welfare systems and even more punitive systems, this article focuses on two specific examples. In the first example pregnant women seeking prenatal care find themselves and their children subject to often coerced or non-consensual drug testing and, as a result of that testing, find themselves subject to child welfare and criminal justice interventions. In the second setting, welfare applicants are subject to drug testing as a condition of receiving public benefits and, as the analysis shows, not only risk non-receipt of subsistence level benefits but are also vulnerable to child welfare and criminal interventions. These examples are highlighted in detail here because of the relative ease of tracing the legal and structural mechanisms that facilitate this process. Having said that it is clear that the phenomena of intersecting systems that escalate punishment in poor communities is broader than these two examples. For example, public housing residents are subject to extraordinary surveillance, which can lead not only to eviction, but also to criminal prosecution. Similarly, the close and continuous interactions between schools and the juvenile justice

[90] ALEXANDER, *supra* note 71, at 13.

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system that make up the school to prison pipeline could also be described and examined through this lens. Because of the specificity with which one can trace the intersecting regulatory systems, the two examples provide a particularly clear sense of the legal and regulatory mechanisms that facilitate escalating punishment.

A. Seeking Prenatal and Pregnancy Care in Public Health Facilities: Drug Testing, Child Protection Interventions and Criminal Prosecutions.

Poor women seeking health care during the course of pregnancy face a set of systems that quite clearly demonstrate the phenomena of regulatory intersectionality. The program at the center of the 2001 Supreme Court decision in *Ferguson v. City of Charleston,*[91] provides an apt example. In *Ferguson*, the Court addressed the constitutionality of a drug testing program established by a task force of police and public hospital employees in Charleston, South Carolina. Under the program, women who sought prenatal care and/or gave birth at a particular state hospital were drug tested without their knowledge or consent if they met one of nine specified, facially race- and class-neutral criteria.[92] If a woman tested positive for cocaine she was subject to prosecution for crimes such as simple possession of a controlled substance, unlawful distribution to a minor, and endangering the welfare of a child.[93] Over the course of its implementation, the program took on various forms, sometimes offering the women a chance to avoid prosecution if they enrolled in treatment programs and sometimes not.[94] Ten women, who received care at the public hospital, were subject to the drug tests, and were subsequently prosecuted, challenged the program on the basis that it violated their rights under the Fourth Amendment. The Court held that the tests were in fact searches under the Fourth Amendment,[95] and that they violated the, "general prohibition against nonconsensual,

[91] *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). For a related discussion of *Ferguson* in the context of class and poverty, see Michele Estrin Gilman, *The Class Differential in Poverty Law*, 77 BROOK. L. REV. 1389, 1427-40 (2012).

[92] *Ferguson,* 532 U.S. at 71 (the nine criteria were no prenatal care, late prenatal care after 24 weeks gestation, incomplete prenatal care, abruptio placentae, intrauterine fetal death, preterm labor of no obvious cause, intrauterine growth retardation of no obvious cause, previously known drug or alcohol abuse, and unexplained congenital abnormalities).

[93] *Id.* at 72-73.

[94] *Id.* at 72.

[95] *Id.* at 76.

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warrantless, and suspicionless searches."[96]

It may be true that the program at issue in *Ferguson* was a product of the much hyped phenomena of "crack babies"[97] and was perhaps, in the overt and targeted nature of the collaboration between the police and hospital, sui generis. Nevertheless, across the country today, the statutory and regulatory frameworks that govern confidentiality of health information, child protection agencies, and criminal justice agencies provide ample opportunities to facilitate the gathering and transmission of data about drug use by pregnant women out of the public health setting and into child welfare and criminal systems. Moreover, despite some of the protections embedded in the laws governing the conduct of health care providers, significant research indicates that information often flows from the public health setting into the child welfare and criminal justice setting despite the law. These intersecting regulatory systems thus provide a clear example, in a quite generic social welfare setting, of regulatory intersectionality.

1. Drug Testing: The Basic Legal Framework

Although drug testing in a variety of contexts is becoming increasingly commonplace,[98] when looking particularly at the drug testing of pregnant women in a health care setting, it is crucial to remember that, except in a very narrow circumstances, information obtained by health professionals in the course of providing medical care must be kept confidential and can only be disclosed with the patient's consent.[99] In addition, as noted by the Supreme Court in *Ferguson*, "[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the

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[96] *Id.* at 86.

[97] *See infra* notes 124-125 and accompanying text.

[98] *See, e.g.*, Craig M. Cornish & Donald B. Louria, *Mass Drug Testing: The Hidden Long-Term Costs*, 33 WM. & MARY L. REV. 95, 95 (1991) ("Widespread drug testing in the American workplace began with President Ronald Reagan's enactment of Executive Order 12,564[.]"); Mary Pilon, *Drug-Testing Company Tied to N.C.A.A. Stirs Criticism*, N.Y. TIMES, Jan. 5, 2013, at SP1 (discussing the proliferation of drug testing in professional and collegiate sports); Mary Pilon, *Middle Schools Add a Team Rule: Get a Drug Test*, N.Y. TIMES, Sept. 23, 2012, at A1 (discussing middle schools that now test for drugs).

[99] *See, e.g.*, American Medical Association, *Patient Confidentiality*, http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/patient-confidentiality.page (last visited Feb. 11, 2013).

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results of those tests will not be shared with nonmedical personnel without her consent."[100] Finally, as the Supreme Court noted in *Ferguson*, unlike in the welfare setting or in an employment setting, a pregnant woman seeking health care in a public health setting is not seeking some benefit a condition of which is passing a drug test.[101] The woman is seeking medical care, the quality of which has always depended on a relationship of trust between doctors and patients.[102]

In the context of drug testing pregnant women, these basic rules of law are complicated by a variety of factors. First, in the vast majority of circumstances, once a pregnant woman goes to a hospital to give birth and signs a generalized consent form, health care professionals can legally order virtually any medical test that they believe to be medically indicated to diagnose and treat the patient.[103] Second, in the context of pregnancy and childbirth, there are valid medical concerns

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[100] Ferguson*,* 532 U.S. at 78.

[101] In discussing the constitutionality of the search at issue in *Ferguson*, the Court distinguished the *Ferguson* facts from the four previous settings in which the Court had ruled on the issue of whether a drug test violated the Fourth Amendment. The four cases involved ". . .drug tests for railway employees involved in train accidents, *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), for United States Customs Service employees seeking promotion to certain sensitive positions, *Treasury Employees v. Von Raab,* 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), and for high school students participating in interscholastic sports, *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). . . [and] . . . for candidates for designated state offices. *Chandler v. Miller,* 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997)." Ferguson, 532 U.S. at 77. As the Court explained, in those cases, "there was no misunderstanding about the purpose of the test or the potential use of the test results, and there were protections against the dissemination of the results to third parties. The use of an adverse test result to disqualify one from eligibility for a particular benefit, such as a promotion or an opportunity to participate in an extracurricular activity, involves a less serious intrusion on privacy than the unauthorized dissemination of such results to third parties." *Id*. at 77-78.

[102] For a discussion of the effect of mandatory reporting laws, on patient trust see Ellen M. Weber, *Child Welfare Interventions for Drug-Dependent Pregnant Women: Limitation of a Non-Public Health Response*, 75 UMKC L REV. 789, 805 (2006).

[103] *See infra* note 117 and accompanying text: Elizabeth A. Warner, MD, Robert M. Walker, MD & Peter D. Friedmann, MD, MPH, *Should Informed Consent be Required for Laboratory Testing for Drugs of Abuse in Medical Settings?*, 115-1 AM. J. OF MEDICINE, 55 (2003) (footnote omitted) ("Currently, explicit informed consent is not required for clinical drug testing. In many cases, such as trauma or overdose, explicit consent is not possible. However, even when substance abuse is suspected and the patient is able to provide consent, clinicians often order drug testing without the patient's knowledge and consent.").

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for the health of both the mother and the fetus during pregnancy and the child after birth, and it is certainly possible that those interests may diverge during the course of treatment. Another complicating factor has to do with laws concerning the reporting of suspected child abuse. Health professionals are, in the vast majority of jurisdictions, mandatory reporters.[104] Although child abuse reporting laws vary significantly by state,[105] it is always true that health care professionals who see evidence of abuse or neglect have a duty to report that to child protection agencies.[106] Finally, in every state, child abuse is crime.[107]

These final two facts bear repeating and emphasis. In virtually every jurisdiction, health care professionals are under a duty to report suspected abuse. And in every jurisdiction people can be prosecuted for various crimes associated with child abuse. Given this long standing, pre-existing legal background, arguably we need no other law or regulatory schema in place either to create a duty to report or for prosecutors to have the authority to prosecute. In light of this, the extensive elaborations of these duties as well as the remarkable legal contortions engaged in by prosecutors and some appellate courts to allow for criminal prosecution in these circumstances[108] constitute a set of legal mechanisms to put society's finger on the scale in favor of child protection and criminal interventions and against the health care and privacy interests of the women involved. Thus, in this example, the mechanisms of regulatory intersectionality serve to facilitate the imposition of escalating punishment on the poor, disproportionately African American women who seek assistance and find themselves subject to these intersecting regulatory systems. This finger on the scale is part and parcel of the hyperregulatory state.

2. Drug Testing of Pregnant Women and Their Children: The Legal Framework and Hospital Practice

Despite the basic legal framework concerning patient autonomy and informed consent, a combination of legal rules and medical practices make it nearly impossible for some pregnant women to both obtain care and avoid drug testing. Moreover, as discussed extensively

[104] *See supra* note 216.
[105] *Id.*
[106] *Id.*
[107] Child Welfare Information Gateway, *Definitions of Child Abuse and Neglect*, http://www.childwelfare.gov/systemwide/laws_policies/statutes/define.pdf (last visited Feb. 11, 2013).
[108] *See infra* notes 161-164 and accompanying text.

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below, the discretionary framework established around drug testing leads to disproportionate punitive impacts on poor African American women.[109]

In two states, Iowa[110] and Kentucky,[111] health care providers are authorized by statute to test women and/or infants for exposure to controlled substances without informed consent. The Iowa provision states:

> If a health practitioner discovers in a child physical or behavioral symptoms of the effects of exposure to cocaine, heroin, amphetamine, methamphetamine, or other illegal drugs, or combinations or derivatives thereof, which were not prescribed by a health practitioner, or if the health practitioner has determined through examination of the natural mother of the child that the child was exposed in utero, the health practitioner *may* perform or cause to be performed a medically relevant test. . . on the child.[112]

Minnesota and Louisiana[113] go even further, mandating, as opposed to authorizing, a test on certain newborns. The Minnesota statue provides that:

> [a] physician *shall* administer to each newborn infant born under the physician's care a toxicology test to determine whether there is evidence of prenatal exposure to a controlled substance, if the physician has reason to believe based on a medical assessment of the mother or the infant, that the mother used a controlled substance for a nonmedical purpose during the pregnancy.[114]

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[109] *See infra* notes 173-184 and accompanying text.
[110] IOWA CODE ANN. § 232.77.
[111] KY. REV. STAT. ANN § 214.160.
[112] IOWA CODE ANN. § 232.77 (West 2014) (emphasis added).
[113] LA. CHILD. CODE ANN art. 610.
[114] MINN. STAT. ANN §626.5562 (emphasis added). Minnesota law mandates testing of pregnant women pursuant to similar rules. Pursuant to the same statutory provision, "A physician shall administer a toxicology test to a pregnant woman under the physician's care or to a woman under the physician's care within 8 hours after delivery to determine whether there is evidence that she has ingested a controlled substance, if the woman has obstetrical complications that are a medical indication of possible use of a controlled substance for a nonmedical purpose." *Id.*

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Although one might assume, from the lack of legislation authorizing testing without consent in the vast majority of states, that in most circumstances newborns are not tested without the mother's consent, in practice there is evidence to suggest that hospitals either routinely test without explicit consent or use the threat of child protective interventions as a means to pressure women to consent.[115] When a pregnant woman goes to a hospital to give birth, she is generally asked to sign a generalized consent form giving health care providers authorization to treat both the mother and the eventual newborn child. Although best practices developed in the field of obstetrical care suggest that no test should be run on a pregnant woman without explicit consent to that test,[116] there is substantial evidence to suggest that hospitals routinely test pregnant women without their consent. In addition, although the law continues to require informed consent, protocols are set at the hospital level.[117] Crucial decisions, including for example whether a general consent to testing includes drug testing or requires specific consent to that test, are left to hospitals to determine.[118]

Despite legal mandates and best practice suggestions, it appears that both pregnant women and their newborn children are often tested without notice or consent. A study funded by the Robert Wood Johnson Foundation as part of the Substance Abuse Policy Research Program and conducted at the National Abandoned Infants Assistance

[115] *See infra* notes 119-123 and accompanying text.

[116] *See, e.g.*, American College of Obstetricians and Gynecologists and American Academy of Pediatrics, *Model Informed Consent: Screening and Testing for Controlled or Addictive Substances in Pregnancy* (on file with author).

[117] Krista Drescher-Burke and Amy Price, *Identifying, Reporting and Responding to Substance Exposed Newborns: An Exploratory Study of Policies and Practices*, Berkeley, CA: The National Abandoned Infants Assistance Resource Center (2005), http://aia.berkeley.edu/media/pdf/rwj_report.pdf; Kathryn Wells, *Substance Abuse and Child Maltreatment*, 56 PEDIATRIC CLIN. N. AM 345, 356 (2009) (stating, in a discussion of best practices protocols for using drug testing as a part screening newborns who may have been exposed to drugs, that, "[d]epending on a hospital's policy, consent may need to be obtained prior to testing the mother or infant.").

[118] A 2009 guideline issued by the Dartmouth-Hitchcock Medical Center, *Guidelines for Care of the Known or Suspected Drug (Illicit Substance) Exposed Newborn*, provides an example of such a policy. Under this guideline, "[p]arental permission is not required for newborn drug screening, but is recommended. The care agreement signed on admission serves as consent to testing." Dartmouth-Hitchcock Medical Center, *Guidelines for Care of the Known or Suspected Drug (Illicit Substance) Exposed Newborn* (on file with author).

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Resource Center at Berkeley[119] examined a variety of laws, policies and practices across eight large urban areas in 2005. The study authors, Krista Drescher-Burke and Amy Price, surveyed public and private hospital personnel in each of the eight cities and interviewed hospital personnel on a variety of topics.[120] Hospital staff were asked questions about notification and consent for drug testing of both mothers and newborns. As to informed consent for the testing of the mother, 87% of hospital respondents told the researchers that the mother would be informed about her own test and 83% told them that the mother would be informed about a test of her child. As, to consent, however the data was quite different.

> . . . [O]f the 34 hospital employees who responded, 41% stated that consent is not required for mothers to be tested, 41% reported that specific consent is required, and 18% reported that consent is included in the hospital's general admission consent. In contrast, a greater number reported that consent is not required for the newborn to be tested: 66% of the respondents indicated that consent is not required for the newborn to be tested; 23% reported that consent is not required for the newborn *if* the test is medically necessary, and 11% noted that the consent to test the newborn is included in the hospital's general consent. It is important to note that *no respondents* reported that a mother's consent is explicitly required to test a newborn.[121]

Moreover, while some hospitals clearly do discuss drug testing of both mothers and newborns with their patients, in practice women face substantial risks for failing to consent. For example, internal guidelines issued by the Dartmouth-Hitchcock Medical Center in New Hampshire specify that, if a parent refuses drug screening for their infant, the need for the test is documented in that mother's medical record and "[t]he parent's refusal of drug screening is reported to the state Child Protective Services . . . as being *potentially* 'neglectful.'"[122]

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[119] Drescher-Burke and Price, *supra* note 117.

[120] The study authors were ultimately able to interview staff from 29 hospitals across the eight cities studied. These included 10 public and 4 private for-profit and 12 private non-profit hospitals. They conducted a total of 39 interviews of hospital staff. *Id.*at 6. Presumably to preserve the anonymity of their research subjects, the report does not reveal the names of the urban areas studied.

[121] Drescher-Burke and Price, *supra* note 117, at 9.

[122] *Guidelines for Care of the Known or Suspected Drug (Illicit Substance) Exposed Newborn*, *supra* note 118 (alteration in original).

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The American College of Obstetrics and Gynecology Model Informed Consent Form indicates concurrence with such policies. In this model form the pregnant woman, while clearly being given the right to refuse a drug test for herself, is told,

> If *you* do not agree to testing when it is recommend by *your* doctor or midwife, it may result in *your baby* being tested after birth if *the baby's medical provider* has reason to be medically concerned for the baby's health. If you newborn is tested and the test results are positive for addictive substances (drugs/alcohol), [Child Protective Services] will be notified.[123]

Thus for all intents and purposes, pregnant women who enter into a hospital setting at birth and who, for whatever reason, are determined to have potentially exposed their fetuses to controlled substances, have little means to avoid drug testing.

3. The consequence within the initial social welfare system that results from the information

A variety of researchers agree that the cultural hysteria around drug addicted newborns, both at the height of the "crack baby" scares in the mid 1980s and today misconstrue the complex relationship between drug use and the health of children exposed in utero to controlled substances.[124] For example, as Lynn Paltrow and Jeanne Flavin have noted, the U.S. Sentencing Commission concluded that, "'[t]he negative effects of prenatal cocaine exposure are significantly less severe than previous believed' and those negative effects 'do not differ from the effects of prenatal exposure to other drugs, both legal and illegal.'"[125] Nevertheless, it is certainly true in some circumstances that the mother's addiction so dominates her choices that it is appropriate to remove her child temporarily or permanently

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[123] American College of Obstetricians and Gynecologists and American Academy of Pediatrics, *Model Informed Consent: Screening and Testing for Controlled or Addictive Substances in Pregnancy* (on file with author).

[124] *See, e.g.,* Jeanne Flavin & Lynn M. Paltrow, *Punishing Pregnant Drug-Using Women: Defying Law, Medicine, and Common Sense*, 29 J. OF ADDICTIVE DISEASES 231, 232 (2010).

[125] *Id*. at 233 (quoting U.S. Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy*, 21-22 (2002), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/ch3.pdf) (last visited Jan. 22, 2013)).

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from her care. In addition it is certainly true that, were appropriate, respectful, comprehensive and affordable services available to support women in facing addiction and in addressing the poverty related conditions that make it hard to parent when one is poor, referring women to treatment and support services might make a great deal of sense. But what does not make sense, and what is manifest in the systems described below, is a focus not on genuine support but on the facilitation of punishment that far too often leads to devastating consequences for both the parent and the child.

There is no question that the possibility that a drug addicted pregnant woman will be tested and, as detailed below, face both intervention by child welfare agencies and prosecution, has significant negative consequences for both the woman and the child in terms of their access to quality health services.[126] First, and most importantly, punitive policies deter pregnant women from seeking care both for their addition and for their pregnancy. As detailed below, South Carolina has consistently wielded the mechanisms of the child welfare and criminal justice systems against pregnant women. The apparent results for the utilization of drug treatment are disturbing. In the year following a decision by the South Carolina Supreme Court to treat a viable fetus as a "child" for the purposes South Carolina's child abuse and endangerment statute,[127] "drug treatment programs in the state experienced as much as an 80% decline in admission of pregnant women."[128]

In addition, as noted by Seema Mohaptra in her article advocating public health as opposed to criminal responses to drug use during pregnancy, organizations as wide ranging and respected as the American Medical Association, the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, and the

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[126] This is not to suggest that there may not also be substantial positive consequences if the mother and child receive appropriate support and care to address the addiction as well as any underlying causes of the addiction. There is, however strong evidence to indicate that these services do not exist. For example, there is a shocking lack of drug treatment program available to serve pregnant women. *See* Julie B. Ehrlich, *Breaking the Law By Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women,* 32 NYU REV. L. & SOC. CHANGE 381, 383 (2008).

[127] *Whitner v. State,* 492 S.E.2d 777, 778 (S.C. 1997).

[128] Cynthia Dailard & Elizabeth Nash, *State Responses to Substance abuse among Pregnant Women*, THE GUTMACHER INSTITUTE (2000), *available at* http://www.guttmacher.org/pubs/tgr/03/6/gr030603.html (last visited Jan. 19, 2013).

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American Public Health Association have raised serious concerns that the emphasis on punitive responses to drug use during pregnancy results in less utilization of vital prenatal care.[129] This is of particular concern for poor women of color. Women in poverty already face substantial barriers to accessing comprehensive prenatal care.[130] For example, the Medicaid program, which provides health care coverage to poor pregnant women, varies significantly by state in terms of the income guidelines, excluding a significant portion of poor pregnant women.[131] In addition depending on the State, prenatal care can be limited. For example, in contravention of best practices in the field of obstetrical care, many states do not provide coverage until several weeks into a pregnancy.[132] Given the importance of prenatal care to maternal and child health, creating an additional substantial disincentive to access care has clear negative impacts on both women and children.

4. Pregnancy and Childbirth At The Intersections: Intervention by Child Protective Agencies

Despite the emphasis within the healthcare profession on patient confidentiality, state and federal law, as well as widespread practice, facilitate the transfer of information out of the public health system

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[129] Seema Mohapatra, *Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy*, 26 WIS. J.L. GENDER & SOC'Y 241, 254-55 (2011) (citing Am. Med. Ass'n Bd. of Trustees, *Legal Interventions During Pregnancy*, 264 J. AM. MED. ASS'N 2663, 2667 (1990); Comm. on Substance Abuse, Am. Acad. of Pediatrics, *Drug Exposed Infants*, 86 PEDIATRICS 639, 641 (1990); Am. Pub. Health Ass'n, *Illicit Drug Use by Pregnant Women, Policy Statement No. 9020*, 8 AM. J. PUB. HEALTH 240 (1990); Comm. on Ethics, Am. College of Obstetrics & Gynecology, *Committee Opinion 321 Maternal Decision Making, Ethics and the Law*, 106 OBSTETRICS & GYNECOLOGY 1127 (2005)).

[130] *See, e.g*,. Barbara M. Aved, Mary M Irwin, Lesley S. Cummings & Nancy Findeisen, *Barriers to Prenatal Care for Low-Income Women*, 158 WESTERN J. OF MED. 493 (1993).

[131] Tara Culp-Ressler & Adam Peck, *Without Obamacare, Families Making Under $5,000 Aren't Poor Enough for Medicaid in Some States*, THINK PROGRESS (Aug. 15, 2012, 9:30 AM), http://thinkprogress.org/health/2012/08/15/690761/without-obamacare-families-making-under-5000-arent-poor-enough-for-medicaid-in-some-states/ ("In five states — Alabama, Arkansas, Indiana, Louisiana, and Texas — a family of three with an annual income over $5,000 makes too much money to receive any Medicaid assistance.").

[132] INSTITUTE OF MEDICINE COMM. TO STUDY OUTREACH FOR PRENATAL CARE, PRENATAL CARE: REACHING MOTHERS, REACHING INFANTS 59 (Sarah S. Brown ed., 1988).

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and into the child protection and criminal justice systems. On the federal level, the Child Abuse Prevention and Treatment Act ("CAPTA") provides a significant amount of funding to state child welfare programs.[133] In order to participate in the program and receive federal funds each state must submit a plan for the administration of its CAPTA program that complies with a variety of federal requirements.[134] Among other conditions, states must put in place policies and procedures to address the needs of infants "born with and identified as being affected by illegal substance abuse . . . including a requirement that health care providers involved in the delivery or care of such infants notify the child protective services system of the occurrence of such condition in such infants."[135]

State law varies significantly both in how health care providers are to identify substance abuse and the criteria they are to use in making a determination about whether to report suspected abuse. In addition, there is some evidence to suggest that, as was the case for drug testing, despite variations in state law, hospital practices lean strongly toward reporting women to child protection agencies whenever a drug test comes back positive.

i. State Statutory Standards for Reporting and Defining Abuse

State law varies significantly on the question of when a health care practitioner can and must make a report to a child protection agency. These reporting laws tend to vary along two basic questions: whether a positive test result itself is enough and whether the report is voluntary or mandatory. Three states (Missouri,[136] Illinois,[137] and Kentucky[138]) allow but do not require referral. Six states (Alaska,[139] Maine[140], Massachusetts,[141] Montana,[142] Nevada[143] and

[133] Administration for Children and Families, *Child Abuse Prevention and Treatment Act State Grants,* Children's Bureau, U.S. Dep't of Health and Human Services, *available at* www.acf.hhs.gov/programs/cb/resource/capta-state-grants (last visited Feb. 11, 2013). www.acf.hhs.gov/programs/cb/resource/capta-state-grants

[134] 42 U.S.C.A. § 5106a(b)(1) (YEAR). This requirement was added to CAPTA in 2003 as a result of the Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36.

[135] 42 U.S.C.A. § 5106a(b)(2)(B)(ii).

[136] MO. REV. STAT § 191.737 (West 2013).

[137] 325 ILL. COMP. STAT. Ch.5/7.3b (West 2013).

[138] KY. REV STAT. ANN § 214.160(3) (West 2013).

[139] ALASKA STAT ANN § 47.17.024(a) (West 2013).

[140] ME. REV. STAT. tit. 22 § 4011-B(1) (West 2013).

[141] MASS. GEN. LAWS ch. 119 §51A(a) (West 2013).

[142] MONT. CODE ANN. § 41-3-201(3) (West 2013).

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Pennsylvania[144]) require reporting upon evidence of something more than just a positive toxicology report. In those states, providers must refer upon a determination that the child is in some way, "adversely affected by a controlled substance."[145] In seven states (Arizona,[146] Iowa,[147] Louisiana,[148] Michigan,[149] Minnesota,[150] Oklahoma,[151] and South Carolina[152]), the referral is required based solely on the positive toxicology report. It is important to keep in mind that, as is often the case with occasional alcohol use during pregnancy, a positive toxicology report does not necessarily mean any harm has occurred.[153] Despite this, in the aforementioned states, any positive toxicology screen leads to a referral to the child protection agency. Finally, four states (South Carolina,[154] Colorado,[155] Maryland,[156] and Wisconsin[157]) legislate not just in the area of when a report should be made but in addition by defining certain acts as abuse per se and allowing for the detention of a child without a court order. For example, in Colorado, a child can be detained without a court order, "when a newborn child is identified . . . as being affected by substance abuse . . . ."[158] The South Carolina statute is without question the most aggressive. That statute creates a presumption, "that a newborn child is an abused or neglected child . . . and that the child cannot be protected from further harm without being removed from the custody of the mother" if the infant or mother tests positive for a non-prescribed controlled substance or if the mother or any child she gave birth to in the past tested positive for a controlled substance.[159]

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[143] NEV. REV. STAT ANN. § 432B.220(3) (West 2011).
[144] 23 PA. CONS. STAT. ANN. § 6386 (West 2013).
[145] *Supra* note 137.
[146] ARIZ. REV. STAT. ANN. §13-3620(E) (West 2013).
[147] IOWA CODE ANN. § 232.77(2) (West 2013).
[148] LA. CHILD. CODE ANN. art. 610 (2012).
[149] MICH. COMP. LAWS § 722.623a (2013).
[150] MINN. STAT. ANN. § 626.5561(1) (West 2013).
[151] OKLA STAT. ANN. tit. 10A, §1-2-101(B)(2) (West 2013).
[152] S.C. CODE ANN. §63-7-1660(F)(1) (West 2012).
[153] *See supra* note 125 and accompanying text.
[154] *Supra* note 150.
[155] COLO. REV. STAT. ANN. §19-3-401(3)(b-c) (West 2013).
[156] MD. CODE ANN., CTS. & JUD. PROC. § 3-818 (West 2013).
[157] WIS. STAT ANN §48.02(1) (West 2013).
[158] *Supra* note 153 at (c)(I).
[159] *Supra* note 150. In full, the statutory provision provides that, "[i]t is presumed that a newborn child is an abused or neglected child as defined in Section 63-7-20 and that the child cannot be protected from further harm without being removed from the custody of the mother upon proof that:
(a) a blood or urine test of the child at birth or a blood or urine test of the mother at

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ii. Reporting in Practice

Despite the significant variation in state law described above, and the clear suggestion in several states that reporting requires some evidence of abuse beyond just a positive toxicology report, in practice, it takes no more than that to result in a report of the child to the child welfare agency. As noted above, The Drescher-Burke and Price study of policies and procedures concerning substance exposed newborns in eight urban centers revealed that, "[r]egardless of the state's laws, most (87%) of the 39 respondents indicated that all identified [substance exposed newborns] are reported to [child protective services]. A positive toxicology test alone appears to trigger a report in most cases."[160] This was true across jurisdictions and despite significant variations in state law.

5. Pregnancy and Childbirth At The Intersections: Intervention by the Criminal Justice System

The use of the criminal justice system to punish women for exposing their unborn children to controlled substances is among the most disturbing examples of the way regulatory intersectionality facilitates escalating punishment. To date no state has successfully passed legislation explicitly criminalizing the transmission of drugs in utero. Despite this lack of explicit legislation, prosecutors have attempted to contort existing criminal laws to include drug use during pregnancy by charging women with crimes such as felony endangerment, criminal child neglect, delivering drugs to a minor, assault, and homicide.[161] In those prosecutions, as a general matter, prosecutors charge women with crimes against a child or person and then seek to prove that the fetus at issue is a child or person as

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birth shows the presence of any amount of a controlled substance or a metabolite of a controlled substance unless the presence of the substance or the metabolite is the result of medical treatment administered to the mother of the infant or the infant, or
(b) the child has a medical diagnosis of fetal alcohol syndrome; and
(c) a blood or urine test of another child of the mother or a blood or urine test of the mother at the birth of another child showed the presence of any amount of a controlled substance or a metabolite of a controlled substance unless the presence of the substance or the metabolite was the result of medical treatment administered to the mother of the infant or the infant, or
(d) another child of the mother has the medical diagnosis of fetal alcohol syndrome."

[160] Drescher-Burke & Price, *supra* note 117, at 9.

[161] Mohapatra, *supra* note 129, at 248-52; Flavin & Paltrow, *supra* note 124, at 233.

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contemplated by the statute. While these prosecutions have clearly led to punishment through plea negotiations,[162] they generally fail when fully litigated. With only two exceptions,[163] every appellate court to consider the issue has overturned these convictions as falling outside the conduct contemplated by these statutes.[164] Despite the lack of explicit legislation and the spate of negative court decisions, hundreds of women have been charged with criminal offenses arising from their drug use during pregnancy.

The most comprehensive study to date on state actions in which, "a woman's pregnancy was a necessary factor leading to attempted and actual deprivations of the woman's physical liberty" was conducted by Lynn M. Paltrow and Jeanne Flavin.[165] Paltrow and Flavin comprehensively reviewed 413 cases that took place between 1973 and 2005, 354 of which involved ". . . efforts to deprive pregnant women of their liberty . . . through the use of existing criminal statutes intended for other purposes."[166]

[162] For examples of cases resulting in punishment through plea negotiations, see Lynn M. Paltrow and Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications Women's Legal Status and Public Health* 39 JOURNAL OF HEALTH POLITICS, POLICY AND THE LAW, 299, 306 (2013).

[163] In *Whitner v. State*, 492 S.E.2d 777 (1997), the South Carolina Supreme Court upheld the prosecution of Cornelia Whitner for criminal child neglect. Ms. Whitner's soon was born in good health but tested positive for cocaine at birth. The Court held that the fetus is a viable "person" for the purposes of the criminal child neglect statute and upheld her conviction. To date this appears to be the only case that has so held. *See also Ex parte* Ankrom, 2013 WL 135748, 1 (2013) (holding that the term "child" found within Alabama's child endangerment statute includes a fetus).

[164] *Ex parte* Ankrom, 2013 WL 135748 at 17 (2013). For cases so holding *see, e.g.*, Cochran v. Kentucky, 315 S.W.3d 325 (Ky. 2010) (holding that an indictment charging a woman for first-degree wanton endangerment based on her ingestion of illegal drugs during pregnancy was invalid on its face); State v. Aiwohi, 123 P.3d 1210 (Haw. 2005) (holding that a mother who smoked crystal meth, leading to the death of her as-of-then unborn son, could not be prosecuted for manslaughter); State v. Cervantes, 223 P.3d 425 (Or. App. 2009) (holding that ingesting drugs during pregnancy was not reckless endangerment); *Ex parte* Perales, 215 S.W.3d 418 (Tx. App. 2007) (holding that a controlled substance entering a child through the umbilical cord is not the "knowing delivery" of that substance to the child).

[165] Paltrow & Flavin, *supra* note 162, at 299. *See also* Flavin & Paltrow, *supra* note 124, at 233 ("National Advocates for Pregnant Women has … documented hundreds of known cases in at least 40 states where pregnant women who are identifed as drug users have been arrested.").

[166] Paltrow & Flavin, *supra* note 162, at 321. In addition to prosecutions, the 413 cases included other forms of forced detention including detentions in hospitals,

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i. The Mechanisms of Reporting: From the Health Care Setting to Child Welfare and Law Enforcement

Despite the prevailing weight of judicial opinions holding that these prosecutions are not lawful, in January of 2013, the Alabama Supreme Court held in *Ex parte Ankrom*[167] that the term "child" found within Alabama's child endangerment statute included a fetus. In so holding the court upheld the convictions of Hope Ankrom and Amanda Kimbrough based on their use of controlled substances during their pregnancies. This case, like its counterpart in South Carolina, raises a whole host of concerns related to reproductive justice. For the purposes of this article however, what is striking is the way that the facts in both prosecutions demonstrate the phenomena of regulatory intersectionality. In the *Ankrom* case the parties stipulated to the following facts:

> On January 31, 2009, the defendant, Hope Ankrom, gave birth to a son, [B.W.], at Medical Center Enterprise. Medical records showed that the defendant tested positive for cocaine prior to giving birth and that the child tested positive for cocaine after birth. . . . Department of Human Resources worker Ashley Arnold became involved and developed a plan for the care of the child. During the investigation the defendant admitted to Ashley that she had used marijuana while she was pregnant but denied using cocaine. Medical records from her doctor show that . . . she had tested positive for cocaine and marijuana on more than one occasion during her pregnancy.[168]

Thus in this case the prosecution was facilitated first by the drug tests conducted by her health care providers both during and after the pregnancy, the referral to child protective services, the collection of information by health care and child protective service staff and the subsequent use of that information to facilitate the prosecution of Ms. Ankrom. The facts in Ms. Kimbrough's prosecution reveal the same set of intersecting regulatory mechanisms. As recited by the Alabama

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mental institutions, and treatment programs, as well as forced medical interventions such as surgery. *Id*. at 301. The study argues persuasively that, due to the extraordinary difficulty in obtaining data about these forced interventions and prosecutions, this figure represents a substantial undercount of those subject to prosecution for crimes involving their pregnancies. *Id.* at 303-05.

[167] 2011 WL 3781258, 1.

[168] *Id*.

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Supreme Court, in Ms. Kimbrough's case,

> The Colbert County Department of Human Resources ('DHR') was notified regarding Kimbrough's testing positive for methamphetamine and Timmy's death, and Kimbrough's other two children were temporarily removed from her home and placed with Kimbrough's mother. A DHR social worker spoke with Kimbrough regarding a safety plan for her children on two occasions. During one of those conversations, Kimbrough admitted that she had smoked methamphetamine with a friend three days before she had experienced labor pains. In July 2008, after having determined that the children would be safe in Kimbrough's home, DHR returned Kimbrough's children to her custody.[169]

Thus in Kimbrough's case too the information about the drug use started with the healthcare system, was transmitted to the child protection agency and was ultimately crucial to support the prosecution. Kimbrough's facts are particularly striking in the ostensibly benevolent purpose of the conversation between Kimbrough and the child protection worker. According to the court, the child protection agency held out that they were interviewing Kimbrough for the purpose of creating a "safety plan" for her family. It was during those conversations that she admitted to the drug use during her pregnancy. Moreover, the agency ultimately concluded that her home was safe for her two other children, and those children were returned to her care. Despite this, however, the admission of drug use by Kimbrough was ultimately utilized not to facilitate the safety of her children but to prosecute Ms. Kimbrough and sentence her to the mandatory statutory minimum penalty: ten years in prison.

Paltrow and Flavin's recent study confirms that the pattern revealed in the *In Re Anrkom* is characteristic of the mechanisms of regulatory intersectionality. Paltrow and Flavin traced the, "mechanisms by which the case came to the attention of police, prosecutors and courts."[170] In 112 of the 413 cases, disclosure came from "health care, drug treatment or social work professionals." In 47 cases, "health care and hospital-based social work professionals disclosed confidential information about pregnant women to child welfare or social service authorities, who in turn reported the case to

[169] *Ex parte* Ankrom, 2013 WL 135748, 4 (Ala. Jan. 11, 2013).
[170] Paltrow & Flavin, *supra* note 162, at 326.

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the police.[171] As they describe it, "[f]ar from being a bulwark against outside intrusion and protecting patient privacy and confidentiality, we find that health care and other 'helping' professionals are sometimes the people gathering information from pregnant women and new mothers and disclosing it to police, prosecutors and court officials."[172]

6. The Disproportionate Impact on Poor Women of Color

At every step along the way, the intersectional and escalating punitive impact of drug testing of pregnant women falls disproportionately on poor African American women.[173]

As detailed above, the process of regulatory intersectionality begins with the decision to administer a drug test to the mother or infant. A recent study was designed to test whether race was used as a factor in deciding whether to test newborns in a context where detailed protocols were in place to guide the decision to test the newborn. After examining the records of 2,121 mother infant pairs, the researchers discovered that, despite the existence of detailed protocols dictating when testing should occur, 35.1% of infants born to Black mothers who met the screening criteria were tested. In contrast only 12.9% of children born to White women who met the screening criteria were tested. The researchers therefore concluded that, "race was used as a factor for determining whether infants should be screened for illicit drugs, even at an institution with a standard protocol that did not include race as a screening factor."[174]

Other researchers have focused on rate of referral of children to child protection agencies. A study conducted in 1990 by Chasnoff et al. as well as a more recent 2012 study conducted by Sarah Roberts

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[171] *Id.* at 326-27.

[172] *Id.* at 327.

[173] Although it would certainly be important to trace these phenomena for other communities of color, I focus on the African American community for two reasons. First, the majority of available data has more detailed and reliable information for African Americans as opposed to other groups. Second, given the targeting of social welfare, child welfare and criminal justice mechanisms at poor African American communities in particular, this analysis is an important place to start.

[174] Marc A. Ellsworth, Timothy P. Stevens & Carl T. D'Angio, *Infant Race Affects Application of Clinical Guidelines When Screening for Drugs of Abuse in Newborns*, 125 PEDIATRICS 1382 (2010)(the researchers found that, ""criteria indication screening should be performed seemed to be selectively ignored…for infants born to white women.").

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and Amani Nuru-Jeter provide compelling data on the extent of disproportionality in the rate of referrals. Chasnoff et al. sought to determine the rate of illicit drug use among pregnant women throughout public and private health care facilities and to explore whether the rates of drug test results reporting correlated with the rates of drug use. They conducted the study shortly after Florida adopted a statewide policy mandating, "the reporting [to the Department of Health] of births to mother who used drugs or alcohol during pregnancy."[175] Pursuant to state policy a positive toxicology screen from either the mother or the child was sufficient evidence to require such a report.[176]

During a one-month period the researchers obtained a urine sample from "every woman who enrolled for prenatal care … at each of the five Pinellas County Health Unit Clinics and from every woman who entered prenatal care . . . at the offices of each of 12 private obstetrical practices in the county."[177] In total they obtained a sample from 715 women. The results across race and class were striking. Of the 715 women, 14.8% tested positive for alcohol, cannabinoids (marijuana), cocaine or opiates. A slightly higher percentage of white women (15.4%) than black women (14.1%) tested positive. As to socioeconomic status, which the researchers determined from the economic demographics of the zip code in which women lived, the researchers concluded that "socioeconomic status . . . did not predict a positive result on toxicologic testing."[178] Despite essentially equivalent rates of positive toxicology screens across race and class, only 1.1% of white women were reported, whereas 10.7% of black women were reported. "Thus, a black woman was 9.6 times more likely than a white woman to be reported for substance abuse during pregnancy."[179]

Roberts and Nuru-Jeter's study suggests similar findings. Relying on a variety of government data collected for administrative reasons, Roberts and Nuru-Jeter examined data from a set of providers in California that had implemented universal testing of pregnant women

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[175] Ira J. Chasnoff, Harvey J. Landress & Mark E. Barrett*, The Prevalence of Illicit-Drug and Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County Florida,* 322 NEW ENGL J. MED 1202 (1990).
[176] *Id*. at 1203.
[177] *Id*.
[178] *Id.* at 1204.
[179] *Id*.

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for drug and alcohol use. They sought to determine whether drug and alcohol use varied by race and whether there were disparities in reporting by race. They concluded that, "[d]espite Black women having alcohol-drug use identified by prenatal providers at similar rates to White women and entering treatment more than expected, Black newborns were four times more likely than White newborns to be reported to CPS at delivery."[180] However, the study authors also note that, due to some differences among the data sets that they drew on in order to reach their findings, it is likely that African American children were reported at even more disproportionate rates than their data suggests.[181]

It is also clearly true that the prosecution of pregnant women for crimes arising from their pregnancies falls disproportionately on poor African American women. Of the 368 women in the Paltrow and Flavin study for which the race of the woman was available, 59% were women of color and 52% were African American.[182] African American women were particularly overrepresented in the South, and were also more likely to be more harshly prosecuted. Of the 354 cases involving prosecutions, 295 were felony prosecutions.[183] While 71% of the White women were charged with felonies, 85% of the African American women were charged with felonies.[184] In addition, 71% of the women in the study qualified for indigent defense, a clear

[180] Sarah C.M. Roberts & Amani Nuru-Jeter, *Universal Screening for Alcohol and Drug Use and Racial Disparities in Child Protective Services Reporting*, 39 J. BEHAV. HEALTH SERVICES & RES. 3, 3 (2012).

[181] *Id.* at 14-15 (explaining that, due to some variations in information available in the multiple data sets they used to reach their conclusions, "comparison of racial distributions of identification data (including the data from the private provider) and reporting data would be expected to show an even greater overrepresentation of Black women among those reported to CPS than among those identified through screening in prenatal care.").

[182] Paltrow & Flavin, *supra* note 162, at 311. Due to limitations in the data, Paltrow and Flavin did not have access to data revealing the race of everyone in their sample. The entire sample of 413 were comprised of cases in which, "a woman's pregnancy was a necessary factor leading to attempted and actual deprivations of the woman's physical liberty." Of those 413, 354 involved, involved ". . . efforts to deprive pregnant women of their liberty . . . through the use of existing criminal statutes intended for other purposes." *Id*. at 321. The 368 women of color cited above appear to include both those prosecuted and those subject to other attempted or actual deprivations of liberty.

[183] *Id*. at 311.

[184] *Id*., at 322.

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indication that these state interventions disproportionately affect poor women.[185]

B. Applying for Welfare: Drug Testing, Child Protection Interventions and Criminal Prosecutions

In recent years, Congress and legislatures across the country have considered, and in seven states passed, legislation to condition the receipt of TANF benefits on consenting to and passing a drug test. In comparison to the research on pregnant women and drug use discussed above, we know very little about how these programs actually operate, whom they affect and how, and the extent and mechanisms of transmission of information from the welfare system into the child welfare and criminal systems. Although we do know in general that punitive policies in the welfare context tend to be targeted disproportionately at recipients of color,[186] we do not have specific data to indicate that that this is occurring in welfare drug testing programs or at the intersections of those programs and other systems. This lack of information comes in part from the relative newness of these programs and in part from the lack of scholars from other disciplines that focus on these issues. Nevertheless, this article highlights this example for a few reasons. First, given the growing trend within state legislatures to institute drug testing programs within their welfare programs, the information below highlights how variations in how statutes are framed can matter a great deal for those who need welfare. To that extent, it gives some information to advocates who might be involved in trying to oppose or shape these programs. In addition, while the majority of scholarship to date on

[185] *Id*. at 311.

[186] *See Hearing Series on Welfare Reform, Work Requirements on the TANF Cash Welfare Program: Hearing Before the Subcomm. on Human Resources of the H. Comm. on Ways and Means*, 107th Cong. 60-69 (2001) (statement of Steve Savner, Senior Staff Att'y, Center for Law and Social Policy). National data suggests that both outcome and the quality of service provision in welfare programs vary along race lines. For example, data measuring "leavers," or households exiting welfare, in Ilinois from June 1997 to June 1999 revealed racial disparities in the reasons for case closure: "A total of 340,958 cases closed . . . , of which 102,423 were whites and 238,535 were minorities. Fifty-four percent of minority cases, but only 39 percent of white cases, closed because the recipient failed to comply with program rules." *Id*. at 65. In addition, various studies indicate better treatment of white recipients than African American recipients in regard to positive encouragement and assistance in job search and provision of supportive assistance such as transportation help. *Id.*

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welfare drug testing has focused on the Fourth Amendment and unconstitutional conditions issues at play,[187] this article highlights how, in this relatively new area of social welfare policy, all the pieces are being put in place to use these systems to impose ever escalating punitive consequences on those who seek aid. In this sense, describing it in this way again provides fodder for those who seek grounds to expose the punitive nature of these programs. Finally, noting the way that regulatory mechanisms are being put in place to facilitate the imposition of ever escalating consequences in this relatively new program provides further evidence of its significance as a key feature of how we govern in social welfare programs.

1. Welfare Drug Testing: Federal Authority and A Trend on the Rise

This legislative trend finds its roots in the devolution of welfare policy embodied in the 1996 welfare reform law. In 1996, Congress enacted the Personal Responsibility and Work Opportunity Act (hereinafter PRA), legislation that fundamentally altered the domestic social safety net by eliminating the entitlement to cash assistance for needy families with dependent children, eliminating benefits for a wide range of lawful immigrants and, among other key elements, devolving significant authority for designing the newly-termed Temporary Assistance to Needy Families (hereinafter TANF) to the states. To guide states in exercising their newly devolved authority, the legislation included a series of provisions permitting the states to include various features in their TANF program. For example, although the PRA generally bars receipt of TANF benefits to adults after five years, states are authorized to, and in fact have, significantly shortened that period of time.[188] Similarly, the PRA included a provision authorizing states to condition receipt of benefits under the Temporary Assistance to Needy Families program to those who do not test positive for drugs. As the legislation states, "[n]otwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of

[187] *See e.g.* Jordan C. Budd, *Pledge Your Body for your Bread: Welfare, Drug Testing and the Inferior Fourth Amendment*, 19 WM & MARY BILL RTS. J. 751 (2011); Walker Newell, *Tax Dollars Earmarked for Drugs? The Policy and Constitutionality of Drug Testing Welfare Recipients*, 43 COLUM. HUM. RTS. L. REV. 215 (2011); Frank G. Barile, Note and Comment, *Learning from Lebron: The Suspicionless Drug Testing of TANF Applicants*, 26 J. OF CIV. RTS. & ECON. DEV. 789 (2012); Ilan Wurman, Note, *Drug Testing Welfare Recipients As An Unconstitutional Condition*, 65 STAN. L. REV. 1153 (2013).

[188] 42 U.S.C. §608(a)(7) (2012).

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controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances . . ."[189] Although in the several years directly following welfare reform, the focus of state activity around drug abuse was on screening and referral to treatment and drug felony bans,[190] in the last several years, there has been an increasing focus on drug testing in both TANF and other public benefit programs.

The trend toward conditioning receipt of public benefits on passing drug tests began in earnest late in 2009 when over twenty states proposed legislation. Over the course of the next several years, despite an unfavorable court ruling holding that suspicionless drug testing programs cannot survive scrutiny under the Fourth Amendment,[191] states continued to try to enact this legislation.[192] In 2010, at least twelve states proposed legislation mandating drug testing of welfare recipients. In 2011, bills were introduced in 36 states.[193] In addition, twelve legislatures proposed drug testing for unemployment and two

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[189] 21 U.S.C. § 862(b) (1996).

[190] *See* Office of the Assistant Sec'y for Planning and Evaluation, *ASPE Issue Brief: Drug Testing Welfare Recipients: Recent Proposals and Continuing Controversies*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, (2011), http://aspe.hhs.gov/hsp/11/DrugTesting/ib.pdf.

[191] Marchwinski v. Howard, 113 F. Supp. 2d 1134 (E.D. Mich. 2000), *rev'd*, 309 F.3d 330 (6th Cir. 2002), *reh'g granted en banc*, *vacated*, 319 F.3d 258 (6th Cir. 2003), *aff'd by an equally divided court*, 60 F. Appx. 601 (6th Cir. 2003). The state of Michigan was the first state to enact a suspicionless drug testing provision that led to denial of benefits. This program, which was enacted in 1999, was immediately challenged and enjoined by the District Court. The District Court held that Michigan's suspicionless drug testing program violated the Fourth Amendment. On appeal the Sixth Circuit initially reversed that opinion only to have the case accepted for hearing en banc. The en banc court split down the middle, with half of the justices voting for affirmance and half voting for reversal. The result in the case was therefore affirmative of the District Court's opinion. Despite the fact that, for the purposes of the Michigan program the provisions are unconstitutional, the split between the judges and between the District and the original appellate bench that heard the case clearly indicate that the law in this area remains profoundly unsettled. More recently the District Court in the Middle District of Florida recently preliminarily enjoined Florida's suspicionless drug testing program. *See* Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011). The case is currently being appealed.

[192] *See Drug Testing and Public Assistance*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/issues-research/human-services/drug-testing-and-public-assistance.aspx (last updated Apr. 17, 2013) ("In 2009, over 20 states proposed legislation that would require drug testing as a condition of eligibility for public assistance programs. In 2010 at least 12 states had similar proposals.").

[193] *Id.*

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cities, Chicago, Illinois and Flint, Michigan proposed a program to ban those who fail a drug test from public housing.[194] In 2012, at least 28 states proposed such legislation.[195] In addition, in 2012, Congress enacted a provision authorizing states to condition receipt of unemployment benefits, in some circumstances, on passing a drug test.[196] Since the 2012 presidential election, legislators in at least four states have said they will introduce or have introduced bills.[197] Today, seven states – Arizona, Florida, Missouri, Tennessee, Georgia, Ohio and Utah – have enacted welfare drug testing programs that allow for partial or complete denial of benefits for refusing to take or failure to pass a drug test.[198]

Both the enacted and the vast swath of proposed legislation vary significantly on several key issues: the severity of the penalty imposed;[199] the emphasis on sanction versus treatment;[200] and crucially for the purposes of the Fourth Amendment, whether or not the state must have some reasonable suspicion before testing.[201] States law and

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[194] A.G. Sulzberger, *States Adding Drug Test as Hurdle for Welfare*, N.Y. TIMES (Oct. 10, 2011), http://www.nytimes.com/2011/10/11/us/states-adding-drug-test-as-hurdle-for-welfare.html?_r=0.

[195] *Drug Testing and Public Assistance*, *supra* note 189 ("At least 28 states put forth proposals requiring drug testing for public assistance applicants or recipients in 2012.").

[196] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, sec. 2105, § 303, 126 Stat 156, 162-63 (2012) (allowing states to condition receipt of unemployment benefits on passing a drug test for any applicant who, "(i) was terminated from employment with the applicant's most recent employer (as defined under the State law) because of the unlawful use of controlled substances; or (ii) is an individual for whom suitable work (as defined under the State law) is only available in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary of Labor)").

[197] Morgan Whitaker, *More States Consider Welfare Drug-Testing Bills*, MSNBC (Dec. 7, 2012, 5:55 PM), http://www.msnbc.com/politicsnation/more-states-consider-welfare-drug-testing-bil ("Ohio, Virginia, and Kansas are not the first states to take up the measure since Election Day. Lone Star State Gov. Rick Perry himself filed a bill in the Texas state legislature in mid-November…").

[198] *Drug Testing and Public Assistance*, *supra* note 189**.**

[199] *Compare* GA. CODE ANN. § 49-4-193(d) (West 2012) (imposing progressive sanctions based on the number of positive tests beginning with a one month sanction) *with* 2013 Ariz, Legis. Serv. Ch. 2, §14) (imposing one year sanction for testing positive).

[200] *Compare* 2013 Ariz, Legis. Serv. Ch. 2, §14 (imposing one year sanction for testing positive) *with* TN CODE ANN. § 71-3-1202(h)(1) (West 2012) (allowing individuals who test positive to receive benefits for six months while in treatment).

[201] *Compare* MO. ANN. STAT § 208.027(1) (West 2012) (requiring that the Department of Social Services, "screen each applicant or recipient who is otherwise

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legislative proposals also vary as to what public benefits are included, ranging from proposals that limit testing to TANF to proposals that include TANF, Supplemental Assistance to Needy Families (formerly termed Food Stamps), unemployment and Medicaid.

2. The Penalty for Failing a Drug Test Within the TANF Program

Although each statute imposes a penalty on the applicant and/or the applicant's dependent children for failing or refusing the drug test, the penalties do vary substantially. For example, in Arizona applicants who fail or refuse a drug screen are ineligible for benefits for one calendar year.[202] In other states the penalties are progressive, based on the number of times one fails a drug screen. For example, in Georgia the first time one fails the applicant loses one month of benefits, but subsequent failed tests lead to progressively longer sanctions. In addition, some states will allow applicants to receive benefits if they enroll in or once they have completed drug treatment. For example, in Tennessee if one enrolls in drug treatment one can receive benefits for six months while in treatment. If the applicant refuses treatment or is positive at the end of treatment, benefits are denied for at least six months. Similarly, in Oklahoma, if one enters treatment, the penalty, which is otherwise twelve months without benefits, can be reduced to six. However, it is important to note that no state legislation creating drug testing mandates include provisions giving priority for drug treatment to welfare applicants nor are there any provisions within those statutes granting additional funding for drug treatment. Given the overall dearth of drug treatment programs for the poor, [203] the inclusion of provisions allowing individuals to receive benefits as long as they are in treatment is somewhat disingenuous.

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eligible for temporary assistance for needy families benefits under this chapter, and then test, using a urine dipstick five panel test, each one who the department has reasonable cause to believe, based on the screening, engages in illegal use of controlled substances . . .") *with* GA. CODE ANN. § 49-4-193(c) (West 2012) (requiring a drug test for "each individual who applies for assistance"). For an extensive summary of proposed and enacted legislation as of 2011, *see Drug Testing Welfare Recipients: Recent Proposals and Continuing Controversies*, *supra* note 186, Appendix A.

[202] 2013 Ariz, Legis. Serv. Ch. 2, §14 (denying benefits for one year as a result of a positive drug test).

[203] Victor Capoccia, Dennis McCarty, & Laura Schmidt, *Closing the Addiction Treatment Gap: A Priority for Health Care Reform*, SPOTLIGHT ON POVERTY AND OPPORTUNITY, (May 3, 2010) http://www.spotlightonpoverty.org/ExclusiveCommentary.aspx?id=049a9de2-a1fc-447e-b36d-3ac90e0bca10.

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In looking at this program through the lens of regulatory intersectionality, it is important to understand the financial consequence to the family for what the program defines as sanctionable or deviant conduct, in this case, the failure or refusal of a drug screen. In evaluating the nature and severity of this consequence, it is helpful to keep a few facts in mind. First, in order to qualify for TANF benefits, you must, among other criteria, be extremely poor. Take as an example a three-person household with one adult, one pre-school age child and one school age child living in Phoenix, Arizona. That family would not qualify for benefits if they have countable income in excess of Arizona's defined standard of need for their family size. For this family of three, they could only qualify for TANF benefits if they have less than $964 in monthly income.[204] That same family, however, would not receive $964 in TANF benefits were they accepted into the program. Instead, if all three household members received benefits, they would receive a maximum of $278 per month or $3,336 per year.[205] If the adult in that family fails or refuses the drug screen, the family would receive, for an entire calendar year, benefits only for the two children.[206] Their TANF grant would then be reduced by 21% from $278 per month to a mere $220 per month or $2,640 per year.[207]

To understand just how low this cash grant is, it is helpful to compare it to two different measures. A first point of comparison is the federal poverty threshold, a measure that is nearly universally acknowledged as outdated and is regarded in many quarters as far too low.[208] The Arizona family of three would fall below the federal poverty line if they earned less than $19,090 in income per year.[209] So the reduced cash grant that results from the drug test sanction lowers the families cash assistance from 18% of the federal poverty level for full benefits to 14% of the poverty level once the sanction is imposed.

[204] *Cash Assistance A1 Needs Standards*, ARIZ. DEP'T OF ECON. SECURITY, https://www.azdes.gov/popup.aspx?id=5422 (last visited Jan. 9, 2013).

[205] *Id*.

[206] ARIZ. REV. STAT. ANN. § 46-201(29).

[207] *Cash Assistance A1 Needs Standards*, *supra* note 201.

[208] For an in-depth discussion of the insufficiency of the current federal poverty measure, see Bach, *supra* note 79, at 278-81.

[209] *2012 Poverty Guidelines*, 77 Fed. Reg. 4034, 4035 (January 26, 2012), http://aspe.hhs.gov/poverty/12poverty.shtml.

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Another useful way to look at these numbers is to compare the family's income under the sanction to what they actually need to meet basic needs. The Center for Women's Welfare at the University of Washington School of Social Work and its director Diana Pierce developed the Self Sufficiency Standard to assist in such analysis.[210] The standard provides a rigorous methodology for calculating how much income particular families, in particular geographic locations, need to meet their basic needs[211] without public or private assistance. According to the 2012 Arizona Self Sufficiency Standard, for the same family, were they to receive no private or public assistance whatsoever, the adult would need to work full time and earn $24.20 per hour for a total of $51,115 in income per year to meet all the families' basic needs.[212] Even if one makes the optimistic assumption that this family is receiving other benefits, such as Supplemental Nutrition Assistance, Medicaid and, perhaps if they are very lucky, subsidized housing, losing $696 in annual income is a devastating blow.

3. Welfare Drug Testing At The Intersections: Intervention by Child Protective and Criminal Justice Systems.

The penalty to the family for the failed or refused drug screen does not stop at the drastic reduction in their already tremendously low level of assistance. The second aspect of regulatory intersectionality describes what else might happen to this family as a result of the stigmatized conduct. As noted above, one variable along which various welfare drug testing statutes differ is the extent of privacy protections built into the legislation. Of particular interest, for the purposes of discussing regulatory intersectionality, are provisions concerning the sharing of this information among government agencies and in particular provisions that allow or mandate the sharing of results with child protective agencies, that require some level of

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[210] For additional information on the standard, see generally *The Self-Sufficiency Standard*, THE CTR. FOR WOMEN'S WELFARE, http://www.selfsufficiencystandard.org (last visited Sept. 26, 2013).

[211] Under the standards methodology, basic needs include geographically specific calculations of expenses in six categories: housing, childcare, food, transportation, healthcare and an addition 10% in miscellaneous expenses. The Center on Women's Welfare, *How is the Self Sufficiency Standard Calculated* (January 9, 2013), http://www.selfsufficiencystandard.org/standard.html#howis.

[212] Diana M. Pearce, *How Much Is Enough In Your County? The Self-Sufficiency Standard for Arizona 2012*, CENTER FOR WOMEN'S WELFARE 59 (May 2012), http://www.selfsufficiencystandard.org/docs/Arizona_2012.pdf.

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child protective investigation and that raise the specter of data sharing with criminal justice agencies.

When looking at these intersecting system phenomena, it is crucial to keep in mind some basic background rules in the area. First, although the extent of privacy protections for drug tests has been eroding in a variety of contexts,[213] its remains true that requiring individuals to consent to a drug test which requires that person to urinate, likely in the presence of a government employee and then give that urine sample to the agency, invades a long protected and long recognized zone of bodily integrity and privacy. As the Court of Appeals for the Fifth Circuit has stated, "[t]here are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all."[214] For this reason, the Supreme Court in *Skinner v Oklahoma* made clear that a mandatory urinalysis constitutes a search for the purposes of the Fourth Amendment.[215]

Moreover, as was the case in the health care setting described above, even before the advent of this spate of welfare drug-testing legislation, welfare officials across the nation[216] and in six of the seven states that have enacted welfare drug testing programs were already required to report suspected abuse to child protective agencies.[217]

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[213] *See supra* note **Error! Bookmark not defined.Error! Bookmark not defined.**.

[214] Nat'l Treasury Emp. Union v. Raab, 816 F.2d 170, 175 (1987).

[215] Skinner v. Ry. Labor Exec. Ass'n, 489 U.S. 602, 617 (1989).

[216] *See, e.g.*, Child Welfare Information Gateway, *supra* note 107, at 2 ("Approximately 48 States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands designate professions whose members are mandated by law to report child maltreatment. Individuals designated as mandatory reporters typically have frequent contact with children. Such individuals may include . . . Social workers; Teachers, principals, and other school personnel; Physicians, nurses, and other health-care workers; Counselors, therapists, and other mental health professionals; Child care providers; Medical examiners or coroners, Law enforcement officers."). *See also Kathryn Krase, Making the Tough Call: Social Workers as Mandated Reporters*, THE NEW SOCIAL WORKER: THE SOCIAL WORK CAREER MAGAZINE, April 6, 2013 (available at http://www.socialworker.com/feature-articles/practice/Making_the_Tough_Call%3A_Social_Workers_as_Mandated_Reporters,_Part_I/)(last visited December 5, 2013).

[217] *See* FLA. STAT. ANN. § 39.201 (West 2013); MO. ANN. STAT. § 210.115 (West 2013); OKLA. STAT. ANN. tit. 10A, § 1-2-101 (West 2013); TENN. CODE ANN. § 37-1-403 (2013); UTAH CODE ANN. §62A-4a-403 (West 2013).

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Thus, the mechanisms described below, to facilitate and in some cases mandate reporting and investigation in light of a positive drug test, seem at best superfluous and at worst, yet another hyperregulatory mechanism to target, punish and criminalize poor, African American mothers.

Jurisdictions vary significantly in the use and strength of privacy protections. One jurisdiction appears to bar the use of test results in collateral investigations and proceedings; many are silent, and a few permit disclosure. In two jurisdictions, however, the programs go beyond permissive disclosure to mandate disclosure to and in some cases intervention by child protection agencies. In addition, in many jurisdictions results of welfare drug tests are available to police and prosecutors. In these cases, the programs seem to be designed to snowball the possible detrimental effect of the positive test far beyond the sanction included in the statute and described above.

Of the seven states that have enacted welfare drug testing programs to date, the statute enacted in Georgia is the only one that appears to provide a comprehensive ban on the use of test results in other investigations and proceedings. The statute provides that,

> [t]he results of any drug test done according to this Code section . . . shall not be used as a part of a criminal investigation or criminal prosecution. Such results shall not be used in a civil action or otherwise disclosed to any person or entity without the express written consent of the person tested or his or her heirs or legal representative.[218]

In contrast to the Georgia provision, most of statutes enacted in the past several years allow disclosure of the drug test results to some or all government agencies. For example, while the Oklahoma and Arizona statutes are silent on the issue of privacy protection,[219] each state's general records access provision allow the sharing of data

[218] GA. CODE ANN. § 49-4-193 (2012).

[219] The silence of the particular welfare drug testing statutes in these states could very well mean, as was the case in Florida, that in implementing the statute, the agencies will enact policies that mandate reporting and action by other parts of the state administrative structure. For a discussion of how this occurred in Florida, *see infra* notes 224-226 and accompanying text.

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between government agencies.[220] Similarly, although the Utah statute bars public disclosure of the test results,[221] underlying records access provisions allow government agencies to provide data to any entity that, "enforces, litigates, or investigates civil, criminal, or administrative law, and the record is necessary to a proceeding or investigation."[222] Tennessee's statute is more restrictive, barring the use of all information received by the department in connection with the drug testing program, "in any public or private proceeding. . . ."[223] However an exception is carved out for any proceeding, "concerning the protection or permanency of children." In addition, although the ban clearly forbids the use of the drug test results in formal proceedings, there appears to be no ban on using them in investigations of any criminal or civil nature, thus leaving open the possibility that the results could be shared with child protection agencies and police.

Two states, Florida and Missouri, go beyond permissive sharing of data to mandate data transmission and investigation by the child protective agencies. The underlying statutes also clearly allow the use of positive drug tests in criminal prosecutions. Like some of the statutes discussed above, the Florida statute that implemented the drug testing program was silent as to the issue of privacy and data sharing.[224] Nevertheless when designing the procedures to be used in implementing the program, the Florida Department of Children and Families instituted procedures which included the sharing of positive drug tests with the Florida Abuse Hotline.[225] As described by the

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[220] *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-807 (2013) (requiring disclosure of child protection records to various government entities to enable such entities, "to meet their duties to provide for the safety, permanency and well-being of a child, provide services to a parent, guardian or custodian or provide services to family members to strengthen the family pursuant to this chapter; . . . [t]o enforce or prosecute any violation involving child abuse or neglect. . . . [and t]o provide information to a defendant after a criminal charge has been filed as required by an order of the criminal court.); OKLA. STAT. ANN. tit. 10A, § 1-6-103 (1993) (allowing inspections without a court order of Juvenile and Department of Human Services records by offices of the Attorney General, and law enforcement personnel).

[221] UTAH CODE ANN. § 35A-3-304.5(5) (West 2012) ("The result of a drug test given under this section is a private record in accordance with Section 63G-2-302 and disclosure to a third party is prohibited except as provided under Title 63G, Chapter 2, Government Records Access and Management Act.").

[222] UTAH CODE ANN. § 63G-2-206(1)(b) (West 2013).

[223] S.B. 2580, 107 Gen. Assemb., Reg. Sess. (Tenn. 2013).

[224] FLA. STAT. ANN. §414.0652 (West 2011).

[225] Complaint at 10, Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011)

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District Court in its decision enjoining the Florida program,

> DCF shares all positive drug tests for controlled substances with the Florida Abuse Hotline. . . . After receiving a positive drug test, a hotline counselor enters a Parent Needs Assistance referral into a child welfare database known as the Florida Safe Families Network. . . A referral is then prepared . . . so that 'other appropriate response to the referral in the particular county of residence of the applicant' may be taken. . . . The statute governing the Florida Abuse Hotline authorizes the disclosure of records from the abuse hotline to '[c]riminal justice agencies of appropriate jurisdiction,' as well as '[t]he state attorney of the judicial circuit in which the child resides or in which the alleged abuse or neglect occurred.' Law enforcement officials may access the Florida Safe Families Network and make such use of the data as they see fit.[226]

The Missouri statute is explicit and, unlike any of the other statutes, mandates reporting not only for those who test positive for drugs but for all those who refuse to take a drug test. The statute provides that "[c]ase workers [who have knowledge that an applicant has either failed or refused a drug test] … shall be required to report or cause a report to be made to the children's division . . . for suspected child abuse as a result of drug abuse."[227]

4. Disproportionality

As noted above, in contrast to the health settings, there are no studies looking specifically at the question of whether welfare drug testing policies are administered in ways that vary by the race of the welfare recipient or that negatively and disproportionately impact African American clients of the system. There is, however, a good deal of information to merit worry that these policies will, like the drug testing policies in the healthcare setting, have these impacts. A few bodies of research justify this concern.

(No. 6:11 Civ. 01473) (stating that applicants are required to sign a "Drug Testing Information Acknowledgement and Consent Release" which includes, among other provisions, that applicants consent that "[i]nformation on a failed test will be shared with the Florida Abuse Hotline for review to initiate an assessment or an offer of services.").

[226] LeBron v. Wilkins, 820 F. Supp. 2d 1273, 1280 (M.D. Fla. 2011) (citations omitted).

[227] MO. ANN. STATE §208.027(2) (West 2011).

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First, as to the question of disproportionate impact in the initial welfare system, while this particular policy has not been studied, researchers have looked at the impact of punitive welfare policies by race and have concluded that punitive policies are targeted disproportionately at clients of color.[228] In addition, for those programs that involve the use of discretion, it is quite clear, as it was in the healthcare setting, that the existence of discretion correlates with disproportionate targeting of poor African American women. Moving beyond the initial welfare setting and to the intersections that arise from reporting out, we do know as a general matter that African American children are referred to child welfare agencies in numbers far outweighing their percentage of the population. Once there, as Dorothy Roberts and others have compellingly described, African American families suffer outcomes far worse than their white counterparts. Similarly, many scholars, including Wacquant and Alexander, have demonstrated that the criminal justice system impacts and is in fact targeted at communities of color in general and at the African American community in particular. Given all this data and that fact that that the statutory and regulatory framework of welfare drug testing is structurally very similar to the structure in the health care setting, there is in fact very good reason to assume that this too will result in disproportionate punishment of African American families.

IV. Regulatory Intersectionality, Hyperregulation and the Supportive State: Implications and Theorizing a Path

At this point, several arguments should be clear. First, as described in Section III, the mechanisms of regulatory intersectionality are strongly present in the social support programs available to poor communities in the United States. The result of this is a state that exacts an enormous punitive toll for seeking support. Second, as suggested in Section II, the mechanisms of regulatory intersectionality contribute to what is here described as the hyperregulatory state. This means that programs of the social safety net are targeted, by race, class, place and gender, to control and subordinate low income communities in general and low income communities of color in particular. In both examples laid out in Section II, punitive

[228] *See* Sanford F. Schram, *Contextualizing Racial Disparities in American Welfare Reform: Toward a New Poverty Research*, 3 PERSP. ON POL., 253 (June 2005).

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consequences were clearly meted out disproportionately to poor African American women.[229]

If these arguments are true, if the state is not merely non-responsive but is instead characterized by the specific phenomena of regulatory intersectionality and the broader mechanisms of hyperregulation, this analysis has significant implications for theorizing a road to a supportive state. Returning to the crucial task of theorizing and building an autonomy enhancing supportive state, what should be clear initially is that we have a very long and complicated road ahead. We have, in short, many assumptions to challenge and much to dismantle before we can begin to build. While the primary purpose of this article was to describe the functioning of regulatory intersectionality in detail and frame that specific phenomena in the broader frame of hyperregulation, what follows below is a brief discussion of some of the lived and theoretical implications, a more detailed analysis of the relationship between vulnerability, regulatory intersectionality, and hyperregulation, some more practical strategies that might hold promise and a cautionary note about the current emphasis, within social welfare policy, on collaboration. Necessarily at this point, what follows raises more questions than it answers.

A. Hyperregulation, Vulnerability, Need and Trust

Perhaps the most important way to start is by drawing out the lived implications of the phenomena described above. Given the pervasiveness of hyperregulatory structures in poor communities, one needn't speculate much in order to understand why many poor women view America's safety net with enormous distrust. It is no secret, in poor communities in the United States, that seeking support involves extraordinary risk. Listening to the voices of women interviewed by Dorothy Roberts in her study of the child welfare system is a strong reminder of this very basic reality. As part of her study, Roberts interviewed an African American woman from Chicago who described her own needs and the punitive role of child welfare agencies in her community. In the woman's words, one can recognize both a profound need and well-founded distrust of those who would offer

[229] It is important to note that the question of whether the targeting of these mechanisms is intentional or not is largely irrelevant too. The argument here is that these many hyperregulatory mechanisms (criminalization, deprivations of basic privacy, regulatory intersectionality and many more) operate, by race, gender, class and place, to exert social control and to subordinate particular poor communities.

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"welfare" to her children:

> '[T]he advertisement [for the child abuse hotline], it just says abuse. If you being abused, this is the number you call, this is the only way you gonna get help. It doesn't say if I'm in need of counseling, or if . . . my children don't have shoes, if I just can't provide groceries even though I may have seven kids, but I only get a hundred something dollars food stamps. And my work check only goes to bills. I can't feed eight of us all off a hundred something dollar food stamps. . . . I don't want to lose my children, so I'm not going to call [Department of Children and Family Services] for help because I only see them take away children.[230]

Given how the mechanisms of regulatory intersectionality function to exact ever-escalating punishments on women who seek support, this woman's words are unsurprising.

As to the implications for theory, it is helpful to return to Fineman's concept of vulnerability (or Eichner's concept of dependency), which maintains, at its heart, that we are all vulnerable (or dependent) and that any theory of the state needs to proceed from this assumption.[231] In light of what is described above, though, it is both profoundly true and yet insufficient to describe women faced with these circumstances as vulnerable. These particular women certainly enter the social welfare state in a state of vulnerability, but once they enter, the mechanisms of the state are structured to render them more and more vulnerable, more and more exposed to punishment and social control. In the examples described above, women who enter those systems and reveal evidence of behavior that the system deems deviant or noncompliant (drug use in both of these examples), are in fact punished within the social welfare program. The women seeking prenatal care are stripped of their rights to privacy and confidentiality and deterred from accessing essential health care.[232] Women seeking welfare face not only the clear violation of privacy involved in submitting to a urine-based drug test, but they face denial, reduction,

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[230] Dorothy E. Roberts, *The Racial Geography of Child Welfare: Toward a New Research Paradigm*, 87 CHILD WELFARE 125, 145-46 (2008) (quoting a woman named Michelle).

[231] *See supra* notes 10-12 and accompanying text.

[232] *See infra* notes 110-123 and accompanying text.

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or termination of the already meager aid offered by the program.[233] But the system is not punitive just in the sense of imposing punishment as a price of support. Instead, the above analysis reveals these systems as hyperregulatory in the sense that Wacquant describes. These social support structures, characterized by regulatory intersectionality, intersect with other regulatory systems and are structured to exact ever-escalating consequences for the woman's deviant conduct. They are also hyperregulatory in the sense that they are targeted. They exact these ever-escalating punitive consequences disproportionately on poor African-American women and poor African-American communities. Being emeshed in these intersecting systems is thus the price of seeking support. A woman or family entering these systems is certainly vulnerable and in need before seeking assistance from the state. But the analysis above reveals that while seeking support may meet some very important need in the short term (one for which women are clearly willing to pay an extraordinary potential cost), it runs the substantial risk of rendering her more rather than less vulnerable. She is, once she seeks support, vulnerable not only because we all are and because meeting one's needs while living in poverty is extraordinarily difficult, but she is vulnerable to escalating punishment by the state.

Moreover, as is the case for many of the hyperregulatory mechanisms described by scholars such as Wacquant, Roberts, Bridges, and Alexander, these mechanisms are part and parcel of larger mechanisms of social control that operate in poor communities. This ultimately results in distinctions by economic status, by race, by gender, and often by place, in how the state operates. Centering the experiences of those subject to these hyperregulatory institutions creates a set of challenges for building a road toward the supportive state.

B. (Re)envisioning an Autonomy Enhancing Supportive State

There is no question that we need a more responsive and supportive state. As Peter Edelman's work continually reminds us, in our haste to condemn the nature of the current support programs, we need to exercise care.[234] We need to preserve what we have,

[233] *See supra* notes 206-212 and accompanying text.

[234] *See, e.g.*, PETER EDELMAN, SO RICH, SO POOR: WHY IT'S SO HARD TO END POVERTY IN AMERICA, 7-23 (2012) (briefly retelling the history of social support since the Great Depression and arguing that in historical perspective, the current

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restructure it to be better, and build upon it. Welfare, food stamps, Medicaid, public housing and other vital programs provide much less than we need, and, as has been argued here, are in many cases part and parcel of the creation of a hyperregulatory state. But at the same time they are tremendously important. We certainly need those programs to be restructured, but it would be beyond foolish to suggest that the appropriate response to the problems described in this article is to dismantle those programs. We need instead to look critically at the structures and administration of these programs. And beyond that we need a state that offers significantly more support to families across the economic spectrum and that does so in ways that support rather than undermine the ability of families and communities to meet their needs and their goals. When Eichner and Roberts call for a set of supportive programs in a newly envisioned child welfare system that offer significant assistance to families all along the way rather than intervening only when there is a crisis and then only to punish, they are calling for more and better support.[235] The question posed by this article is not whether we need such a supportive or responsive state. We clearly do. Instead it asks how we might re-envision both the support programs we already have and the ones we need in order to enhance the autonomy of families in poverty.

1. An Autonomy-Supporting State: Abandoning Both Violations of Privacy and Structures of Punishment

On a theoretical level, in order to build a responsive state, we must significantly expand our collective notion of what constitutes and enables the exercise of autonomy. As explained in Section I, this involves abandoning the flawed notion of an autonomous subject and replacing it with a conception of the vulnerable or dependent subject.

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safety net, although profoundly inadequate, has strong elements and provides significant support).

[235] In the conclusion of SHATTERED BONDS, Roberts provides a compelling vision of a newly structured child welfare system. Although she calls for changes well beyond this, an essential piece involves shifting the emphasis to family support and preservation. As she describes it, "Federal and state governments already spend more than $10 billion annually on the child welfare system. But most of the money goes to maintaining children in out-of-home care. Centering the system's services on family support and preservation would be a matter of shifting these funds from their current destructive purpose." ROBERTS, SHATTERED BONDS, *supra* note 76, at 269. Eichner provides similar vision of how we might restructure that system: "In contrast to the existing system . . . the government would funnel its resources first and foremost into ensuring that existing families have the social support to provide for children's well being." EICHNER, *supra* note 2, at 119.

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This would give rise to a state that would be compelled to provide the material conditions necessary for people to exercise a much more robust version of autonomy. It also holds promise in that it could also lead, in Fineman's vision, to far more substantive equality.[236] One mechanism to ensure this level of autonomy enhancing support lies, as Roberts argues, in a much more robust conception of privacy. As Roberts frames it, "merely ensuring the individual's 'right to be let alone' – may be inadequate to protect the dignity and autonomy of the poor and oppressed."[237] Indeed a better notion of privacy "includes not only the negative proscription against government coercion, but

[236] *See infra* note 31 and accompanying text. For a strong endorsement of the strength of these claims to counter the subordination within the legal structures that target poor African American communities see Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low Income Women*, ___ U.C. IRVINE L. REV 101, 152 (2013) (arguing that "[t]he simple rhetorical transition from using the terms "the poor" to "the vulnerable" may help shift and soften some of the disgust now aimed at the poor. . . [A]ddressing economic vulnerability requires a material commitment to making sure that grim failures of structural economic risk are not borne disproportionately by the most vulnerable members of society, namely low-income women of color and their children. The existence of deep poverty in the United States is not a sign of widespread behavioral failures by individuals; it is an expression of political will. Deep poverty can be willed away by divesting government monies from policies that criminalize the poor and investing monies in basic subsistence.")(NOTE TO LR EDITOR – I PULLED THIS QUOTE AND THE PAGE NUMBER FROM A PAGE PROOF COPY I RECEIVED FROM KAARYN. WE WILL NEED TO PULL THE FINAL VERSION ONCE IT'S OUT). If in fact, the state is compelled, through this restructured notion of autonomy, to provide the support we collectively need to realize a more robust vision of self-determination, this could give rise to a quite radical restructuring of social and economic institutions. One need only recall the discussion above of today's vast income disparities and the atrociously inadequate material failure of the current safety net to meet the needs of those in poverty to see that a supportive state on these terms, would require significant economic and political change. June Carbone has recently suggested that Eichner's work leads almost inevitably to these consequences. In a recent review of Eichner's book, Carbone suggested that, while Eichner herself does not conclude that her vision would require a significant restructuring of structural economic inequality, fully realizing the theory would require such a restructuring. June Carbone, Book Review, *The Supportive State: Families, Government, and America's Political Ideals*, 11 PERSP. ON POL. 241, 242 (2013) ("If we assume, for example, as a growing body of evidence indicates, that greater inequality itself harms family stability, would liberal theory compel adoption of more egalitarian policies even at the expense of greater economic 'inefficiency'? Does the state have an obligation to address class-based differences in fertility in order to compel greater equality? Must it champion stronger families even if higher taxes or greater regulation limit the autonomy of the wealthy? If greater inequality is inevitably a threat to the family, does that make it intrinsically incompatible with justice for that reason alone?").

[237] Roberts, *Punishing Drug Addicts*, *supra* note 76, at 1478.

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also the affirmative duty of government to protection the individual's personhood from degradation and to facilitate the processes of choice and self-determination."[238]

But the import of the existence of regulatory intersectionality suggests that in addition to privacy from intrusion and an affirmative duty of support one needs safety from punishment. To understand how this might function it is helpful to briefly examine the phenomena of privacy intrusions and escalating punishment in turn.

As to privacy, Khiara Bridges argues that social support programs like PCAP are so fundamentally imbued with structures that assume no privacy that, in our current socio-political and legal environment, it is more accurate to say that the poor families have no privacy rights to begin within.[239] This is certainly born out in her careful analysis as well as in the examples above. Although the focus of this article has been on the mechanisms of escalating punishment rather than on the privacy deprivations inherent in these programs, there is no question that these examples also confirm Bridges' characterization of social support.

The focus on the regulatory mechanisms that lead to ever escalating punishment suggests a separate and additional price. Poor women seeking support not only suffer extraordinary deprivations of privacy, but those deprivations of privacy lead to the gathering (and negative characterization) of information, which then in turn leads to additional punishment. Kaaryn Gustafson's extensive work on the criminalization of welfare[240] lays bare many of the mechanisms that are in place to exact this punitive toll. The mechanisms of enhanced punishment and disproportionate impact of regulatory intersectionality

[238] *Id.* at 1479.

[239] Bridges, *supra* note 55, at 173. Bridges argues from her example that class controls who has rights and that the poor simply fall on the wrong side of the dividing line. *Id*. One could easily point to the mechanisms and outcomes in this article and come to the same conclusion. In her discussion, Bridges turns to the viability of the rights frameworks suggested by Roberts, Eichman and Fineman, among others, which Bridges characterizes as "rights *to"* as opposed to "rights *against.*" *Id.* at 174. In discussing the viability of these rights, she raises the disturbing possibility that "[t]here is a danger that the poor would, in spite of a revolutionary reformulation of rights, find themselves in the same predicament in which they now find themselves: possessing 'rights' without substance, meaning or effect." Bridges, *supra* note 55, at 174. This prospect is similarly raised by the mechanisms described in this article.

[240] *See infra* notes 57-63 and accompanying text.

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described above provide further information about precisely how the state administers itself to facilitate enhanced punishment.

To return to the examples in Section III, the cost a poor woman pays for support is not only the devastating cost of losing control of her home, her body, and her personal information. She also submits, as a price of support, to serious risk of punishment. To put it differently, while it should be true, as the Supreme Court noted in *Ferguson*, that "[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent,"[241] for poor, disproportionately African American women, this is an assumption that does not comport with reality. Given how mechanisms of regulatory intersectionality actually function, it is far more reasonable for a poor, African-American woman to assume both that she has no privacy and that the cost of seeking prenatal or childbirth care may well be the investigation of her family, the loss of her children, and her possible prosecution and incarceration. And this is true for her even though her higher income white counterpart, who is just as likely to have used drugs during her pregnancy, is far less likely to face these escalating penalties. An applicant for welfare faces similar risks and may pay a similar price.

To rewrite this formula, then, is to abandon the structural mechanisms not only of deprivations of privacy, but those mechanisms that facilitate escalating punishment. To the extent that the phenomena of regulatory intersectionality facilitates hyperregulation – the targeting by race, class, gender and place of particular people so as to exert social control on those people – we must dismantle it and build something better in its place. Below are some far more practically focused suggestions about how we might think about getting there.

C. Some Steps on the Path Forward

As briefly detailed in Section II, in the 1930s the United States made a fundamental decision to bifurcate its programs of social support. One system was put in place for those who are not poor and another was put in place for those who are poor and "deserving."[242] As a matter of law and systems, this allows us to administer these two categories of assistance in profoundly different ways. So even though

[241] *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001).
[242] *See infra* notes 48-49 and accompanying text.

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it seems evident that a middle class family receiving social security retirement benefits or Medicare would never tolerate the price of support imposed for poor families, this poses no administrative problem. The two systems can be and in fact are simply run tremendously differently.

To the extent that this is true, one answer to the question of how to move forward lies both in moving when possible to benefits that are more universal, or short of that benefits that are quasi-universal as described below. To the extent that moving towards universal (or quasi-universal) benefits is not politically feasible, moving forward involves restructuring poverty targeted programs in four ways: erecting more privacy protections and higher bars on surveillance and monitoring in the first place, enforcing and creating new privacy protections within systems once information is collected, building higher walls between support systems and punishment systems and finally exercising significant caution in the face of calls for coordination and collaboration.

1. Towards Universal Benefits and Universally Employed Structures (But Carefully)[243]

As noted in Section II of this article,[244] the institutions of the social welfare state in the United States have, since at least the New Deal, been bifurcated, with one set of programs - social security, Medicare and the like - going to one group of people and another set - Welfare, Medicaid, Food Stamps (now the Supplemental Nutrition Assistance Program or SNAP) and the like - going to the poor. Although it has not been a focus of this article, other scholars have documented the ways in which these poverty-focused programs have been characterized by behavioral controls and racialized tropes. They have

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[243] Eichner's vision of the Supportive State impacts a wide range of policy areas. Very roughly speaking realizing a supportive state would entail revisions of both how the market operates and the creation of programs and institutions to address vulnerability and dependency needs. In the first category, the supportive state would include policies regulating the market: "upper limit[s] on mandatory working hours, … paid time off for caretaking, [prohibitions on the firing of] parents of young children … for refusing to work overtime, and … flexible hours [requirements]." EICHNER, *supra* note 2, at 65. On the programmatic and institutional side the supportive state would include the provision of, for example, universal health care, subsidized high quality childcare and pre school education and high quality public schools. The analysis in this paper focuses exclusively on the programmatic and institutional support mechanisms of the supportive state.

[244] *See infra* notes 48-49 and accompanying text.

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also extensively documented the ways in which, as legal barriers to receipt fell in the late 1960s and early 1970s and the rolls grew to include significant numbers of African American families, an extraordinary backlash took place. This backlash wielded racial tropes (the most powerful among them was the welfare queen) to radically restructure and gut virtually all of what remained of what was Aid to Families With Dependent Children. Even today, as the "new" welfare program, Temporary Assistance to Needy Families, is almost entirely in shambles, provides less and less, and serves fewer and fewer of those in need,[245] it remains the continued target of significant punitive legislative and popular attack. One need only look at the trend toward welfare drug testing in the face of both data demonstrating the fiscal and policy failures and the consistent judicial disapproval of these programs to understand the continued political value of anti-welfare legislation to building political capital.[246] Although welfare arguably continues to be the object of the most political scorn, nearly every program that provides obvious and direct support exclusively to those in poverty is easily and continuously attacked on the same basis and with the same hateful tools.

It is certainly true, given this atrocious history and continued political attacks, that programs that seem and/or are more universal have considerably more promise for garnering political support. Ideally it would be far better for the supportive state overall if we had universal benefits: for example universal health care and a universal caregiver subsidy. There is no shortage of models for such programs and, as many have noted, European countries provide many good examples of what universal support might look like. Having said that, however, proposing universal benefits in the American context faces perhaps insurmountable political barriers. Given recent history, some much more politically promising examples come in the form of

[245] Nationally, the effectiveness of Temporary Assistance to Needy Families ("TANF") in serving and meeting the financial assistance needs of those in poverty has fallen precipitously. For example, in 1996, TANF provided some measure of assistance to 72% if families in poverty. in 2011, that number had plummeted to the point where TANF served only 27% of families in poverty. TANF also pays significantly less to those families. In 1996, TANF provided families with 35% of the funds necessary to raise that family to the federal poverty measure whereas by 2011, that number had fallen to 28%. *A TANF Misery Index*, LEGAL MOMENTUM 1 (Apr. 9, 2013), http://www.legalmomentum.org/our-work/women-and-poverty/a-tanf-misery-index.pdf).

[246] On the trend to implement welfare drug testing *see infra* notes 191-198and accompanying text. On the issues of the constitutionality of these statutes, see articles cited in note 187.

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benefits that, while targeted toward those in poverty, are structured through mechanisms and systems that serve those who also not low income. Benefits like these have recently and productively been described by Suzanne Mettler as part of a "submerged state," the benefits of which both provide significant financial support and, crucially, are not readily visible either to those who receive them or as a supportive program of the state.[247] A prominent recent examples of success in that area come the form of the Earned Income Tax Credit ("EITC"). The EITC is submerged within a regulatory institution and regulatory framework that administers programs that serve those not in poverty.

The EITC is administered by the Internal Revenue Service, and, as is the case for other tax benefits, is granted largely based on self-reporting.[248] The EITC has been lauded as one of the most effective anti-poverty policies in recent years.[249] Although it has not been without its significant detractors, there is no question that the EITC is tremendously effective in transferring income into the hands of low income working families and lifting them out of poverty. In 2011, for example, the combined effect of the EITC and the Child Care Tax Credit, "lifted 9.4 million people, including 4.9 million children above the Census Bureau new research Supplemental Poverty Measure."[250]

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[247] SUZANNE METTLER, THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLITICS UNDERMINE AMERICAN DEMOCRACY 4 (2011) (arguing that the invisible nature of many of the benefits received by the non-poor in America, principle examples of which are tax code benefits such as the home mortgage deduction, are not visible in political discourse. Mettler makes the argument, quite persuasively that this invisibility, when contrasted with the highly visible nature of poverty programs, enables the sustaining, in the American political conversation, of an image that the non-poor do not depend on the government. Mettler argues that it is essential for the health of American democracy to make those programs visible, to in effect emerge the submerged state. While I absolutely agree with this point, I am using Mettler here slightly differently – to suggest that submerged benefits, precisely because of their comparative invisibility, have and likely will continue to garner more political support that visible programs.).

[248] Dennis J. Ventry Jr., *Welfare by Any Other Name: Tax Transfers and the EITC*, 56 AM. UN. L. REV. 1261, 1264 (2007).

[249] *See, e.g.*, Chuck Marr, Jimmy Charite & Chye-Ching Huang, *Earned Income*, CTR. ON BUDGET 1 (Apr. 9, 2013), http://www.cppb.org/files/6-26-12tax.pdf.

[250] *Id*. at 9. The Supplemental Poverty Measure was promulgated in 2010 to provide a more accurate measure of poverty. Like the official poverty measure it sets a an annual income threshold below which a family is defined as poor. But it is seen as more accurate primarily because of its inclusion of the effect of tax credits and governemtns benefits, its inclusion of work related and medical expenses, its recalculation of the poverty income threshold and its inclusion of geographic

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For the purposes of this analysis, what is interesting is the administrative structure surrounding the EITC. Like any other personal tax benefit, eligibility for the credit is established through self-reporting on a taxpayer's income tax forms. This system of administration is a far cry from programs like TANF or the PCAP program described by Khiara Bridges, both of which involve significant intrusions and data collection well beyond what is required to establish financial eligibility for the programs.

Although benefits that are imbedded within regulatory agencies and programs that serve a more universal population are less visible and therefore less subject to the overt political attacks suffered by programs associated with "welfare," it is crucial to remember that, even in these more universal regulatory settings, there are plenty of reasons to worry about the continued targeting of those in poverty. A couple of examples suggest this conclusion. First, one might recall that the laws regulating health care, the privacy of medical information and the use of child welfare and criminal justice administration that were highlighted in Section III's discussion of pregnant women seeking health care do not in fact differ explicitly by race or income status. We have no law, nor could we given the state of our constitutional jurisprudence, that calls for the clear disparities in administration of these laws when it comes to poor black women and their children. And yet the evidence of disproportionate punitive impacts is quite clear.[251] Similarly, although the EITC is imbedded within the tax code, it is clear that the IRS focuses a disproportionate portion of its auditing resources on low income taxpayers.[252] These disparities suggest that, even in programs regulated by arms of the regulatory state that impact larger proportions of the population, one must remain vigilant that the poor in general, and poor communities of color in particular, are not subject to more scrutiny and regulation within those agencies.

2. Restructuring Poverty Programs and Building New Ones

Though calls for universal benefits and/or significantly increased

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variation in the cost of living. Kathleen Short, *The Research Supplemental Poverty Measure: 2011*, U. S. DEP'T OF COMMERCE (Nov. 2011), https://www.census.gov/hhes/povmeas/methodology/supplemental/research/Short_ResearchSPM2011.pdf).

[251] *See supra* Section III(A)(6).

[252] *See* Leslie Book, *The IRS's EITC Compliance Regime: Taxpayers Caught in the Net*, 81 OR. L. REV. 351, 374 (2002); Ventry, *supra* note 248, at 1273-74.

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low-income benefits administered by agencies like the IRS might well address some of the concerns raised in this article, the heart of the critique falls on what remains of programs designed explicitly to serve those in poverty. It also falls by implication on those programs, essential to a robust supportive or responsive state, that might provide significantly more support to poor families. Addressing the twofold harm described above (privacy deprivation and punishment) involves four steps: erecting more privacy protections and higher bars on surveillance and monitoring in the first place; enforcing and creating new privacy protections within systems once information is collected; building higher walls between support systems and punishment systems, and, finally, exercising significant caution in the face of calls for coordination and collaboration.

i. Protecting Informational Privacy and Respecting Family Autonomy

In the support programs discussed in this article, women are forced, as a condition of either applying for the benefit (in the case of welfare) or seeking the service (in the case of health care) to part with vital information that, in other settings and for other people, would be considered private. Although the demand for and collection of this information is clearly a harm in and of itself, what's important here is that the information (and negative interpretation of the information) leads to the punishment. The decision, imbedded within formal and informal legal and regulatory structures described above, to seek a drug test leads to additional intervention, questioning, and information acquisition. Doctors, nurses, and social workers intervene and question, collecting information that ultimately results in punitive actions against the family by the child protection and criminal justice agencies.[253] One need only recall the sources for facts underlying the child abuse prosecutions and the findings of Flavin and Paltrow to recall that health care providers, social workers and child protection staff provide much of the information to justify punishing these families.

What if, instead, programs were restructured to protect the informational privacy of the women involved? What if it were the woman herself who chose whether she would submit to drug tests and

[253] Bridges's work on the PCAP program provides another compelling example of the ways in which extensive information gathering is imbedded within the legal framework and regulatory systems of poverty programs. *See* Bridges, *supra* note 55.

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additional interviews. What if the contents of her medical records were in fact confidential and there were a very high and enforceable bar against disclosure? What if we significantly shifted program eligibility rules and administrative structures to require the gathering of only minimal information and respected the rights of families to keep their homes, their bodies, and, in the vast majority of circumstances, the choices they make about how to parent private?

These proposals almost inevitably lead to calls of caution concerning the welfare of children, and it is certainly true that we continue to need mechanisms to intervene in cases of abuse and neglect. But before concluding that we cannot take the legal and regulatory finger towards intervention off the scale and rebalance it to lean much more strongly toward informational privacy, it is important to remember that, for families who are not poor, this is already the case. For communities that are not in poverty we apparently assume as a society that having laws against child abuse and neglect and the ability to prosecute child abuse is enough to protect children. It is only in those programs that actually (welfare) or as a matter of practice (health care in poor communities) serve and target poor, disproportionately African American communities that we have put our legal and regulatory mechanism on the scale toward monitoring, information gathering, information-sharing and escalating punishment. To rebalance the state toward autonomy is to address this class and race disparity.

ii. Enforcing Existing Privacy Protections and Choosing to Incorporate New Ones

To begin to move toward this rebalancing, it is important to note that much of the information transmission described in this article happened in contravention of the law. For example, as noted in Section III, despite significant variations in state law some of which would have clearly banned some or all reporting, in one of the studies discussed above, health care providers told researchers that they reported virtually every substance exposed newborn. In other cases, there are clear policy choices involved. Although some of the welfare drug testing legislation calls for reporting to child protective agencies, some of the are in fact far more protective.[254] While the data on drug testing in the health care setting suggests that these privacy protections

[254] For an example of slightly more protective statutes in Georgia and Tennessee, see *supra* notes 218 and 223 and accompanying text.

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are likely to provide little actual protection, it is worth noting that some privacy protections exist. To the extent that this is the case, research, systemic advocacy and individual representation efforts designed to expose and punish violation of these protections would represent a small positive step. In addition, as proposals to impose drug testing on recipients of public benefits programs on the state and federal level continue to be presented, for those jurisdictions where they cannot be entirely defeated, it is worth it to devote advocacy resources to pushing for strong privacy protections. Finally for those who provide legal services to the poor, it is also worth it to pay careful attention to privacy protections within the systems that impact their client's lives. To the extent that we can enforce existing protections and create new ones, this might represent small progress in addressing the harms described in this article.

iii. Building High Walls Between Support and Punishment

In the examples of regulatory intersectionality above, information travels with extraordinary ease from the support setting to more punitive settings. To address this much higher walls are in order. If we are to restructure poverty-focused support programs to support the autonomy of poor families, we need to erect much higher walls between programs that are designed to support families and programs that are explicitly punitive. If the child welfare system is reimagined, as the supportive or responsive state would call for, to focus far more resources on support of families over intervention, removal and foster care, this would need to include a very strong separation between those parts of the state that support and the parts of the state that can impose punishment. Similarly the extraordinary administrative presence of policing and prosecution in support programs needs to be eliminated. In the vast majority of circumstances those who purport to offer support: people like teachers, social workers, doctors, nurses and non-profit staff simply should not regularly be sharing information with police and prosecutors. It should be the extraordinary rather than the expected case that these actors end up as witnesses for the prosecution. Lest we conclude that this is impossible it's important to recall, as this article suggested at the start, that systems of support that look like this already exist. For those who are not poor this is precisely how support functions in their communities. While it may be difficult to imagine, doing so is an essential task going forward.

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iv. Exercising Significant Caution In Settings Involving Collaboration and Coordination.

A final note involves the implications of this analysis for the persistent calls and use, within social service programs, for collaboration and coordination of services. Seemingly everywhere one looks in the social service, child welfare, and juvenile justice worlds, there are extensive calls for coordination and co-location of services. These programs generally include extensive provisions for and mechanisms to facilitate data sharing among agencies. While there is no doubt that, in certain circumstances, these efforts to coordinate and co-locate yield benefits for clients of those systems, the data in this article suggests that we should exercise significant caution. In thinking about whether to engage in collaboration we might ask, from the perspective of regulatory intersectionality, what punitive outcomes might result from the collaboration? Does the collaboration require data sharing with agencies that have the statutory power to remove children and/or to use information to support prosecutions of children and families? Will the clients be primarily poor families of color? If so, what safeguards exist to ensure that these punitive outcomes will not disproportionately impact families of color? What safeguards and protections exist for families to protect their privacy and to ensure that the information they share does not end up facilitating their punishment? Do client's have rights, imbedded within the program, to choose only some services and to set the terms of service in a way that enhances rather than compromises their autonomy? These and other questions are essential if we are to engage in these projects in a way that guards against the disturbing outcomes described in this paper.

CONCLUSION

Moving from today's hyperregulatory state to an autonomy-enhancing supportive state is an enormous and daunting task to which scholars and activists must devote their considerable energies and talents. By re-centering the question of how to realize this goal on the lived institutional structures of the today's domestic social welfare state, this paper has attempted to give a sense of the daunting challenges ahead, to suggest some necessary steps in this path, and to suggest areas for future research and activism. In conclusion though I'd like return, for a moment, to where this paper began. Imagine again that you are a person in need of support. You have plans, dreams and hopes for yourself, for your family, and for your children,

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but it is difficult to realize all of this on your own. You need help. Depending on who you are, where you are and what your life has brought so far, the support you need might vary significantly from the support that others need to realize their own dreams and goals. If the state provided that support, what form would it take? What risks should you have to take, in terms of the safety of yourself and your family, in order to get that support? How best might the state assist you in realizing your goals? If we can each answer those questions for ourselves, perhaps at least the task of envisioning a supportive state is not so difficult after all.

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